82-6686

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-v.-

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED

1. Whether judicial consideration of petitioner's claim that his death sentence is constitutionally excessive under Enmund v. Florida, ___U.S. ___, 73 L.Ed.2d 1140 (1982), must be limited to the evidence of record available at trial, when the State, despite timely defense requests, deliberately withheld during trial important evidence that other unknown parties may have been involved in the crimes and may themselves have committed the homicides?

2. Whether petitioner's sentencing jury should have been permitted to consider in mitigation certain evidence withheld by the State which suggested that other unknown parties may have been involved in the crimes and may have themselves committed the homicides?

3. Whether this Court's holding in Enmund v. Florida, __U.S. __, 73 L.Ed.2d 1140 (1982) should be given prospective application only?

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Petitioner Larry Leon Chaney respectfully prays that a writ of certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this case.

CITATION TO OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals affirming the denial of postconviction relief, which has not yet been officially reported, is annexed hereto as Appendix A. The order of the District Court for Tulsa County, Oklahoma, denying postconviction relief, which is unreported, is annexed hereto as Appendix B.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on February 3, 1983. By order entered March 25, 1983, Justice White granted an application extending petitioner's time to file a petition for certiorari in this Court to and including May 4, 1983. This Court's jursdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death for the kidnapping and murder of a wealthy Tulsa horse breeder, Mrs. Kendal Ashmore, who disappeared with her Assistant, Ms. Kathy Brown, on March 17, 1977. The two women left their home on the morning of March 17th in a blue and white pickup truck for a meeting at 1:00 P.M. with one "Richard Elliot," an unknown horse buyer. The Ashmore's pickup truck was found abandoned the next morning in an empty Tulsa lot. Mrs. Ashmore's husband, Phillip, subsequently received a series of telephone calls on March 17 and 18, demanding $500,000 and threatening Mrs. Ashmore with death unless the demand was met. The second such telephone call, placed on March 18th, was traced by investigators to a telephone in petitioner's home. Two hours later, a third extortion call was placed from a public telephone booth; petitioner's palm print was discovered on the telephone equipment at this location. At 3:30 A.M. the following morning, police entered petitioner's home, arrested him, and searched the premises. In a wastebasket, they found shreds of paper revealing the notation "1:00 P.M. Thursday Richard Elliot 299-9791." Three days after petitioner's arrest, the bodies of

Mrs. Ashmore and Ms. Brown were discovered strangled and buried in shallow graves on a tract of real estate in which petitioner had a land contract interest some 100 miles from Tulsa.

The State's case against petitioner at trial included no direct evidence that petitioner had been seen near the victims or their pickup truck, near their residence, or at the gravesite. Instead, the State relied upon the strong circumstantial evidence outlined above. Petitioner maintained his innocence of the murder charges throughout the trial. Indeed, one of his witnesses, a forensic pathologist, testified that the two women could not have been strangled before March 21 or March 22, well after petitioner had been taken into custody (Tr. 1036-46).[1/]

Prior to the trial, petitioner's counsel -- aware that the State's case, although strongly implying petitioner's involvement in the kidnapping, did not directly connect his client to the murders -- had filed a Motion to Produce requesting, inter alia, "[s]tatements of all persons who have been interviewed by . . . any . . . governmental agency in connection with the subject matter of this case, . . . 2. [t]ranscriptions of any oral statements made by any person to . . . a member of any . . . governmental agency . . . 4. [t]he names and addresses of all persons who may have some knowledge of the facts involved in the instant case . . . 9. [a]ny and all other evidence now in the custody of the District Attorney's Office . . . which may be favorable to the Defendant or exculpatory." (Motion to Produce, annexed hereto as Appendix C,C1-3.)

1/ Each reference to the transcript of the trial of petitioner's case, held in the District Court for Tulsa County on September 6-15, 1977, will be indicated by the abbreviation "Tr." followed by the page number on which the reference may be found.

The State, in response, produced no evidence suggesting that anyone other than petitioner may have been involved in the crime. Yet four years after petitioner was convicted, requests by a Tulsa newspaper under the federal Freedom of Information Act, 5 U.S.C. §522 (1977),[2] led to the disclosure of interview reports with three witnesses completed by the Federal Bureau of Investigation within days after the victims' abduction, all of which were turned over to the Tulsa District Attorney at that time (May '81 Tr., 10-17).[3] These reports (collectively appended to this petition as Exhibit D), concern three incidents connected with the case. Most significantly, one witness[4] told the reporting FBI agent that "she live[d] in the vicinity of the ASHMORE residence and . . . [was] acquainted with Mrs. ASHMORE and sees her frequently in the vicinity of their residence." (App. D, at D. 7.) The witness reported that "at approximately 4:10 P.M. on Thursday, March 17, 1977" -- three hours after Mrs. Ashmore's scheduled appointment with Mr. Elliot -- "she recognized Mrs. ASHMORE as being in a blue and white pickup truck which she had previously known to be driven by the ASHMORES . . . in front of the Well's Grocery Store . . . [in] Jenks, Oklahoma." (*Id.*) The witness reported that "Mrs. ASHMORE was under the steering wheel and a man was sitting next to her with a female on the far side." (*Id.*) The witness was sure of the time, she stated, since she had just picked her son up from school at 4:00 P.M. (*id.*, at D. 8). She also reported having heard fire trucks pass the store while she was present (id.); an independent Fire Incident Report confirmed that firetrucks in fact passed the store between 4:08 and 4:11 P.M. (May '81 Tr. 38-39).[5/]

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[2] See *World Pub. Co. Inc. v. Dep't. of Justice,* No. 81-C-601-C (June 17, 1982 N.D. Okla.).

[3] Each reference to the transcript of a hearing held in the District Court for Tulsa County on May 1, 1981 in *Chaney v. Oklahoma*, No. CRF-77-756, will be indicated by the abbreviation "May '81 Tr." followed by the page number on which the reference may be found.

[4] The identities of all three witnesses were concealed in the copies of the reports made available to defense counsel.

This encounter, petitioner has insisted, is highly material to his defense, since the State's evidence firmly placed petitioner alone, walking in rural Sequoyah County nearly 110 miles from Jenks, between 3:00 P.M. and 3:30 P.M. on the afternoon of March 17th (Tr. 665-88), and placed him at a convenience store in Sequoyah County, still over 100 miles from Jenks, at 4:39 P.M. (Tr. 690-97). The statement would obviously impeach the State's contention at trial that petitioner had strangled the two women and buried them on his property on the afternoon of March 17th. (See, e.g., Tr. 824-32; 1147; 1210-16.)

A second witness reported to the FBI that at approximately 7:30 A.M. on March 18, 1977, as he drove into the area where the Ashmore pickup was found, he "noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building." (App. D, at D. 3.) The witness

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[5/] The District Attorney acknowledged that he had received and read this report "several times" (May '81 Tr. 18) and that he knew of nothing prior to trial suggesting that this witness had recanted her testimony (id., at 19). By the time the report became available to petitioner in 1981, the witness had apparently become uncertain about her ability specifically to recollect and identify Mrs. Ashmore (id., 27, 34), but petitioner's counsel offered to prove that the investigating FBI agent, if permitted to testify, would have stated that "he was absolutely and certainly positive that the written reduction of the oral statements made to him by [the witness] . . . was a true and accurate transmission of what had been said to him." (Transcript of July 8, 1981 Hearing in Chaney v. Oklahoma, at 4.)

The witness described the driver of the pickup truck, which was identified as that belonging to the Ashmores, as "a white male, age unknown but neither real old or young, 6', slender build, wearing a light-weight jacket and a hat." (Id.,at 4.) The State did not dispute that this description of the unidentified driver does not match that of petitioner, and other evidence conclusively established that petitioner was at his workplace elsewhere in Tulsa at the time this witness observed the Ashmore pickup truck being driven into the lot (Tr. 302).[6/]

Upon discovering this previously undisclosed evidence in April of 1981, petitioner filed an application for postconviction relief, pursuant to Okla. Stat. tit. 22 §1080 (1980), asserting that the failure of the State to disclose these reports violated this Court's holding in Brady v. Maryland, 373 U.S. 83 (1963). Both the District Court for Tulsa County and the Oklahoma Court of Criminal Appeals rejected petitioner's application. The Court of Criminal Appeals (in an unreported order annexed as Appendix E), reasoned that the undisclosed evidence "was not material" (App. E, at E.1.):

> "Even if the appellant's evidence was viewed in the light most favorable to him, it does not tend to exculpate him. Instead, it merely tends to suggest that appellant was not the only person involved in the kidnapping and murders. If a mysterious second person were the one who actually strangled the victims, the appellant must still be considered a principal in the murders."

(Id.)

[6/] The third item of evidence revealed by the FBI reports was that a schoolboy, riding past the site where one State's witness claimed he had the Ashmore pickup under surveillance, stated that he noticed -- not a blue and white pickup such as the Ashmores owned, but "a new looking red pickup with a white stripe across it," which he particularly "noticed . . . because it was shiny red [with] . . . a 'clip-on' type CB antenna on the driver's side of the truck." (App. D, at D. 5.)(The FBI agent confirmed in his report that the youth's school bus had in fact stopped in traffic for a considerable period of time at that location on the day in question. (Id., at D. 6)).

After unsuccessfully petitioning this Court for certiorari,[7/] and pursuing certain other procedural steps,[8/] petitioner filed the present application on June 28, 1982, asserting that imposition of a sentence of death upon him would be excessive and disproportionate punishment in light of this newly discovered evidence. The District Court after learning of this Court's opinion on July 2, 1982 in Enmund v. Florida, ___U.S. ___, 73 L.Ed.2d 1140 (1982), permitted petitioner to amend his application in light of Enmund.

Petitioner called to the District Court's attention that the trial court had charged the jury that "under the law of this State all persons concerned in the commission of crime[sic] . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals" (Jury Instruction No. 4), and that "[a] homicide, although unintended, if committed in the commission of kidnapping constitutes murder in the first degree" (Jury Instruction No. 6). On August 9, 1982, the District Court, after acknowledging "that Enmund v. Florida . . . constitute[s an] intervening change in the law" excusing any failure previously to assert petitioner's claims (App. B, at B. 4), nevertheless denied the application on the merits.

[7/] Chaney v. Oklahoma, 456 U.S. 919 (1982)(Brennan & Marshall, JJ., dissenting).

[8/] On June 15, 1982, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Oklahoma. That Court dismissed the petition on June 25, 1982, under authority of Rose v. Lundy, 455 U.S. 509 (1982), finding that petitioner had failed to exhaust certain of his constitutional claims. See Chaney v. Meachum, No. 82-C-625-BT (N.D. Okla. June 25, 1982)(order dismissing petition).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner alleged in his application for postconviction relief filed in the District Court on June 28, 1982,that the imposition of a sentence of death in his case, without evidence showing that he took the life of the victim, attempted to take the life of the victim, or intended to take the life of the victim would violate the Eighth and Fourteenth Amendments to the Constitution of the United States. In the hearings held in the District Court on July 7 and 13, 1982, petitioner referred the District Court directly to this Court's holding in Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982),and argued that Enmund required reversal of his death sentence. The District Court rejected petitioner's Enmund claims on two grounds. First, it "presume[d] . . . that Enmund [was] . . . of prospective application only" and was not "applicable to these 1977 circumstances" (App. B, at B. 4 & n.4). Second, the District Court found Enmund to be "distinguishable in both factual and legal content from the instant case." (Id.) Ignoring the substantial newly discovered evidence to which petitioner had directed it and deliberately confining itself to the facts of record in 1977, the District Court found, in contrast to Enmund, that "Petitioner Chaney was, according to all material evidence presented, the one and only actor herein" (App. B., at B.5):

> "Thus not only was Petitioner not himself an accomplice or inferential accomplice to the murder by others, but this record in its entirety is devoid of any competent, material evidence upon which to infer, much less establish, that he himself was merely waiting in the wings while some ' . . . mysterious second person . . .'6/ actually strangled the victims in this case.
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> * * *
>
> 6/ Chaney v. State, Okl. Cr., __P. 2d __, "Order Affirming Denial of Post-Conviction Relief (P.C. 81-345, 11-12-81), at page 7. As a point of clarification the Court does note that no

> affirmative proof offered by Petitioner Chaney demonstrated that any other person committed these acts of murder."

(Id.) The District Court, in a footnote, indicated that it was "mindful" of petitioner's newly discovered evidence, but held that "neither the Court nor Petitioner is at liberty to now reexamine the proposed relationship between those facts and the proposition Petitioner now seeks to establish" (App. B, at B.6 n.8). The District Court's opinion additionally placed great reliance upon the trial jury's finding that petitioner had committed the murder "either with premeditation or with the substituted malice" imputed to him under the felony murder theory charged to the jury. (Id., at B. 8.)

In his initial brief in support of his petition-in-error to the Court of Criminal Appeals, petitioner argued that "the jury instructions" in petitioner's case, "allowed the jury to impose the death sentence without a specific finding of perpetration, knowledge, or intent required by Enmund" (Brief in Support, at 1); petitioner further urged that the State's evidence that linked petitioner to the kidnapping did not constitute "evidence that he was the perpetrator, or had knowledge or intent that murder be committed." (Id., at 5.)

In his Supplemental Brief, petitioner also contended that "[t]he holdings in Enmund v. Florida . . . and Eddings v. Oklahoma . . . demand that the sentencing body consider as a mitigating factor the exculpatory evidence denied this petitioner irrespective of an independent due process violation claim under Brady v. Maryland." (Supplemental Brief, at 1-3.) Petitioner contended that the "particular mitigating factor, evidence of another individual who could have been the perpetrator of the murder," was neither presented to nor considered by petitioner's jury solely because of the "failure of the [State] . . . to release clearly exculpatory evidence prior to trial" (id., at 4), and he argued that the State could not constitutionally be permitted "to profit from its own bad faith and violation of well-known constitutional due process requirements." (Id.)

The Oklahoma Court of Criminal Appeals denied petitioner's claims on their merits.[9/] The Court, accepting the District Court's statement that "'Petitioner Chaney was, according to all material evidence presented, the one and only actor herein,'" agreed that thereby "the trial court properly distinguished Enmund v. Florida, both factually and legally, from petitioner's case." (App. A, at A.4.) The Court summarily dismissed petitioner's argument under Enmund that the trial court's jury instructions impermissibly allowed his jury to impose a sentence of death on no more than a finding of accessorial liability to a felony murder committed by another with the brief observation that, on petitioner's original appeal in 1977, "the jury instructions were found to be proper." (Id.) The Court did not expressly address petitioner's argument under Eddings and the Enmund dissent that petitioner's jury was entitled, at a minimum, to hear in mitigation the evidence suppressed by the State during trial which indicated (i) the possible direct role of other participants in the murder of the two women and (ii) the implausibility of the State's theory that petitioner had personally strangled the victims on March 17th.

9/ The Court of Criminal Appeals expressly found that the District Court had "properly applied the doctrine of Res Judicata in petitioner's subsequent post-conviction application" (App. A., at A. 4), and thus rejected the State's claim that petitioner had procedurally waived these claims.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STATE -- AFTER DELIBERATELY WITHHOLDING EVIDENCE THAT PERSONS OTHER THAN PETITIONER MAY HAVE BEEN INVOLVED IN THE VICTIMS' DEATHS -- CAN REJECT PETITIONER'S CHALLENGE TO HIS DEATH SENTENCE UNDER ENMUND V. FLORIDA SOLELY IN RELIANCE UPON THE RECORD EVIDENCE AVAILABLE TO PETITIONER AT THE TIME OF TRIAL

In Enmund v. Florida, __U.S. __, 73 L.Ed.2d 1140 (1982), this Court vacated Earl Enmund's sentence of death as excessive and disproportionate punishment under the Eighth and Fourteenth Amendments. Although "the record supported . . . the inference that Enmund" had participated willingly in an armed robbery during which an elderly couple had been murdered, Enmund v. Florida, supra, 73 L.Ed.2d at 1145, and indicated that Enmund had been "in the car by the side of the road at the time of the killings, waiting to help the robbers escape," id., the Court found "the record before us [did] not warrant a finding that Enmund had any intention of participating in or facilitating a murder," id. at 1152. Observing that only a minority of jurisdictions (including the State of Oklahoma) would permit the imposition of the death penalty for a vicarious felony murder, id. at 1146-47 and 1148 n.13, the Court held that "[f]or purposes of imposing the death penalty," a defendant's "punishment must be tailored to his personal responsibility and moral guilt," and that a death sentence for one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," id. at 1151, would be constitutionally excessive.

In the present case, although the State possessed no direct evidence that petitioner had killed the victims, it presented a strong circumstantial case that petitioner had been involved in the victims' kidnapping. Since the jury heard no evidence suggesting that any other suspects might be involved in the crimes and since the bodies were eventually found on petitioner's property, the inference was strong that petitioner had committed not only the kidnappings but the murders as well. Lest the jury hesitate to convict and sentence petitioner to death on such a circumstantial case, moreover, the trial court instructed the jury on principles of accomplice liability -- that "all persons concerned in the commission of crime. . . whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals," -- and on felony murder -- that "[a] homicide, although unintended, if committed in the commission of kidnapping constitutes murder in the first degree."

Even if the relevant inquiry were limited to the evidence of record, petitioner's case would present a substantial question as to the quantum of circumstantial proof required in a capital case to render harmless a trial court's failure, under *Enmund v. Florida*, to obtain a specific jury finding that the defendant had killed, attempted to kill or intended to kill. However, the facts on this petition present a somewhat stronger though related question. Here, undisclosed evidence, known to the State prior to trial, was made available to petitioner only four years later, under a federal court order. This newly available evidence, statements by three witnesses given to FBI officials shortly after the crimes, strongly suggests: (i) that there may exist one or even two unidentified participants in the kidnapping;[10] that (ii) the State's theory, under which petitioner had himself strangled and buried the victims on the afternoon of March 17th could not be true (since the victims were reported seen in a pickup in Jenks, Oklahoma at 4:10 P.M. on March 17th, over 100 miles from rural Sequoyah County where petitioner was observed by State's witnesses at 3:30 P.M. and later at 4:40 P.M. that afternoon); and that (iii) the testimony of the State's medical expert, suggested that the victims were killed on March 17th, was open to substantial question. The jury never wrestled with the questions posed by this testimony, however, since the State withheld this evidence, despite petitioner's timely and direct written request for all witness statements, all reports of oral statements, and the names of all witnesses.

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[10] One would be the "white male . . . 6', slender build, wearing a light-weight jacket and a hat" seen parking the Ashmore pickup on the morning of March 18th. Another might be the passenger, description unknown, seen sitting in the Ashmore pickup on the afternoon of March 17th.

On these facts, the question before this Court is whether a State may, during a capital trial, suppress evidence which points to the existence of other perpetrators and diminishes the likelihood of defendant's participation in the actual homicide, and thereafter to insist that any evaluation of a defendant's _Enmund_ claim be confined to the evidence of record. Principles of due process announced by the Court in _Brady v. Maryland_, 373 U.S. 83 (1963), strongly imply that such a course cannot be tolerated in a capital case. In _Brady_, the Court affirmed the vacatur of a death sentence imposed on a capital inmate whose counsel had been denied pretrial access to an extra-judicial statement made by a co-defendant, admitting responsibility for the actual homicide. _Brady v. Maryland_, _supra_, 373 U.S. at 84. The Court held that the Fourteenth Amendment was violated "where the [suppressed] evidence is material either to guilt or to punishment," _id_. at 87; even if, under Mayland law, the confession could not have reduced petitioner's offense below murder in the first degree, the Court noted, it could have affected petitioner's sentence.

Brady was of course decided under fundamental fairness principles of the Fourteenth Amendment; Enmund has now held that the Eighth Amendment bars any death sentence imposed absent proof that the defendant himself killed, attempted to kill, or intended to kill. If evidence concerning a defendant's culpability for a homicide may not constitutionally be suppressed when, as in Brady, its ultimate significance, if credited, is left to the jury's discretion, surely it may not constitutionally be suppressed when, as here, such evidence might constitutionally require a sentence of life imprisonment if credited. The Oklahoma Court of Criminal Appeals, however, has implicitly held that such newly discovered evidence is irrelevant to its evaluation of petitioner's Enmund claim in this case.

The Court should grant certiorari to address the significant question presented by the opinion of the Oklahoma court.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER IN LIGHT OF ENMUND V. FLORIDA AND EDDINGS V. OKLAHOMA, THE EIGHTH AMENDMENT FORBIDS THE STATE'S SUPPRESSION OF EVIDENCE THAT MIGHT MITIGATE PETITIONER'S CRIME

The opinion of the Oklahoma Court of Criminal Appeals in this case stands not merely at odds with the majority opinion in Enmund v. Florida but with the minority opinion as well. Writing for four members of the Court, Justice O'Connor contended in Enmund that a remand for a new sentencing hearing was required because of "the trial judge's incomplete and erroneous view of the facts of the crime." Enmund v. Florida, __U.S.__, 73 L.Ed. 2d 1140, 1172-73 (1982). The minority reasoned that "in deciding whether or not to impose capital punishment on a felony murderer, a sentencer must consider any relevant evidence or arguments that the death sentence is inappropriate for a particular defendant because of his relative lack of mens rea and his participation in the murder." Enmund v. Florida, supra, 73 L.Ed.2d at 1171-72.

The trial court's "erroneous belief that the petitioner had shot both of the victims" constituted a "fundamental misunderstanding of petitioner's role in the crimes . . . [which] prevented the trial court from considering the 'circumstances of the particular offense' in imposing sentence," thereby violating the Eighth Amendment. Id. at 1173.

The minority opinion in Enmund is fully consistent with the Court's prior teachings on this subject. From Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) through Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court has insisted that "'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of . . . the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" Eddings v. Oklahoma, supra, 455 U.S. at 112.

In Eddings, the constitutional flaw was the trial court's refusal as a matter of law to consider mitigating evidence relevant to the defendant's character: "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Id., at 115. In petitioner's case, the initial fault lay with the prosecutor, not the sentencing authority, who acted unilaterally to "exclud[e] such evidence from [the jury's] consideration" by failing to disclose its existence to petitioner or his counsel prior to trial. Yet upon its discovery, in the proceedings below, the Oklahoma courts implicitly sanctioned the prosecutor's practice by declining to consider the excluded evidence in ruling on petitioner's Enmund claim. It seems constitutionally indefensible to defeat the sentencing jury's obligation to weigh all possible mitigating evidence by permitting the State to conceal the existence of such evidence despite a timely request from the defendant.

For this additional reason, the Court should grant certiorari to review the opinion of the Oklahoma Court of Criminal Appeals.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER ENMUND V. FLORIDA IS OF PROSPECTIVE APPLICATION ONLY

The District Court for Tulsa County rejected petitioner's Enmund claim in part because of its "presumption" that "Enmund is of prospective application only." (App. B, at B. 4.) The Court of Criminal Appeals, while not directly addressing this point, found "that the trial court properly distinguished Enmund v. Florida, both factually and legally, from petitioner's case." (App. A, at A. 4.)

This Court in Enmund gave no hint that its opinion should be applied prospectively only. Indeed, the invariable practice of the Court has been to afford retroactive application to any decision finding a procedure under which a sentence of death has been imposed to be constitutionally deficient. See,e.g., Bolden v. Holman, 394 U.S. 478, 484 (1969)(per curiam)(applying Witherspoon v. Illinois, 391 U.S. 510 (1968) retroactively); Moore v. Illinois, 408 U.S. 786 (1972)(applying Furman v. Georgia, 408 U.S. 238 (1972) retroactively); Songer v. Florida, 430 U.S. 952 (1977)(applying Gardner v. Florida, 430 U.S. 349 (1977) retroactively); Jordan v. Arizona, 438 U.S. 911 (1978)(applying Lockett v. Ohio, 438 U.S. 586 (1978) retroactively).

Moreover, departure from this practice would seem contrary to the Court's basic principles governing the retroactivity of its decisions, see, e.g., Hankerson v. North Carolina, 432 U.S. 233 (1977); Ivan V. v. City of New York, 407 U.S. 203 (1972), which look to the risk that a constitutional violation may have "substantially impaired [the] . . . truth-finding function and so raise[d] serious questions about the accuracy of . . .

verdicts," Hankerson v. North Carolina, supra, 432 U.S. at 241. In capital cases, where there exists a constitutionally special "need for reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, supra, 428 U.S. at 305, retroactive application of decisions that impinge on the reliability of a sentencing verdict seems compelled.

The Court should grant certiorari to determine whether Enmund v. Florida should be applied prospectively only.

CONCLUSION

Petitioner's writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Oklahoma Court of Criminal Appeals
February 3, 1983

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 3 1983
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY LEON CHANEY,)
)
Petitioner,)
)
-vs-) NO. PC-82-487
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On August 3, 1982, the above petitioner, Larry Leon Chaney, filed his petition in this Court seeking an appeal from denial of post-conviction relief from Tulsa County District Court, Case No. CRF-77-756. Petitioner was allowed additional time in which to file a brief in support of his petition. Thereafter, the Attorney General for the State of Oklahoma was allowed time in which to file a response to petitioner's petition and brief. Oral argument was held in this Court on January 12, 1983. Mr. Allen M. Smallwood represented petitioner and Mr. Robert Nance, Assistant Attorney General, represented the State.

In the order issued by the Tulsa County District Court, the record of facts, which petitioner adopts in his brief, were stated as follows:

1. Petitioner was duly convicted by jury verdict and sentenced to death on September 22, 1977.

2. The petitioner perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, cited as Chaney v. State, 612 P.2d 269 (Okl.Cr.1980), reh.den., (9-12-80), wherein the Court of Criminal Appeals affirmed the petitioner's conviction and sentence of death.

3. Thereafter petitioner sought review in the Supreme Court of the United States, by way of writ of certiorari, which was denied by that Honorable Court, Chaney v. Oklahoma, 450 U.S.1025, 101 S.Ct. 1731, 68 L.Ed.2d 219 (1981).

4. On April 3, 1981, petitioner filed his first Application for Post-Conviction Relief under the auspices of 22 O.S., § 1080 et seq. Thereafter, and subsequent to hearings in the matter, the District Court of Tulsa County entered "Order Denying Application for Post-Conviction Relief."

5. The petitioner appealed said order to the Court of Criminal Appeals of the State of Oklahoma, which resulted in the entry of "Order Affirming Denial of Post-Conviction Relief" on November 12, 1981, in Case No. PC-81-345.

6. From the Court of Criminal Appeals' denial of post-conviction relief, the petitioner again petitioned the United States Supreme Court for review by way of writ of certiorari, which the Supreme Court denied on April 5, 1982.

7. Thereafter, petitioner filed petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Oklahoma, No. 82-C-625-B. Therein, the Court dismissed petitioner's petition for Writ of Habeas Corpus on June 25, 1982, under the authority of Rose v. Lundy, ___ U.S.___, 102 S.Ct. 1198, 71 L.Ed.2d 379(1982).

8. The petitioner next filed the instant Application for Post-Conviction Relief, on June 28, 1982, acknowledging therein at page 3, paragraph V that this is his second such application for post-conviction relief.

9. To the instant application the State of Oklahoma filed its Response, alleging the bar of the doctrine of Res Judicata, 22 O.S., § 1086, on July 2, 1982. Also, on July 2, 1982, the United States Supreme Court entered its decision in Enmund v. Florida,___ U.S.___, 102 S.Ct.___ (1982). Thereafter, on July 7, 1982, a hearing was conducted by the trial court, at which Counsel Smallwood and Assistant District Attorney Raymond were present and presented argument and authority, and at the conclusion of which the Court allowed petitioner until July 13, 1982, to amend his Application for Post-Conviction Relief (if he so desired) to demonstrate in what manner and to what extent the Enmund case served to avoid the bar of Res Judicata, in light of petitioner's specific

record acknowledgment that the present proceeding is his second Application for Post-Conviction Relief.

10. On July 13, 1982, the court conducted further hearing, and again entertained argument and presentation of authority of counsel. As a result of said hearing, Petitioner Chaney's Second Application for Post-Conviction Relief was overruled and denied.

Petitioner asserts in this post-conviction appeal that his conviction should be reversed or his sentence modified because of errors of law committed by the trial court at his hearing on his application for post-conviction relief. He first asserts that by failing to find that the United States Supreme Court decision in Enmund v. Florida, supra, was not sufficient to overcome the bar presented by 22 O.S.1981, § 1086, preventing subsequent application for post-conviction relief was error. And secondly, by finding that 22 O.S.1981, § 1086 constitutes a bar, in a subsequent application, the issue that the petitioner's sentence was disproportionate and excessive in that the trial testimony revealed no evidence showing that petitioner took the life of the victim, attempted to take the life of the victim, or attempted to take that life, in light of the holding in Enmund v. Florida, supra.

The order signed by the Honorable Jay D. Dalton, District Judge, on July 13, 1982, and filed on August 9, 1982, found that the doctrine of Res Judicata applied as a bar to petitioner's filing a subsequent application for post-conviction relief under 22 O.S.1981, § 1086; and that Enmund v. Florida, supra, would constitute intervening change in the law and, in that sense, thereby sufficiently excuse petitioner from earlier raising same under 22 O.S.1981, § 1086, however, the court further found that Enmund v. Florida, supra, is distinguishable in both factual and legal content. Therefore, the Tulsa County District Court further found that Enmund does not afford petitioner support for the relief being sought. Consequently, petitioner's application for post-conviction relief was denied. From that denial this appeal has been perfected.

In his brief filed in this Court, petitioner concedes that 22 O.S.1981, § 1086, would ordinarily constitute a bar to the subsequent filing of applications for post-conviction relief. But, petitioner asserts that *Enmund* v. *Florida*, provides that "sufficient reason" for overcoming the bar. The State counters with the argument that "the jury did find that the defendant personally and intentionally (more than inference) committed this murder in the course of a felony, Kidnapping for the purpose of Extortion," and such being the fact *Enmund* is inapplicable to the facts of petitioner's case.

Also, the district court order distinguishes *Enmund* from petitioner's case, "...Petitioner Chaney was, according to all material evidence presented, the one and only actor herein." The district court order proceeds to reflect that the jury found that petitioner personally committed the intentional act of murder for which he was charged, thereby taking his case outside the scope of *Enmund*.

Petitioner also complains of the trial court's instructions numbered 6, 7, and 10. However in the appeal lodged in this Court the jury instructions were found to be proper. Notwithstanding petitioner's contention that the jury made no specific findings of fact regarding the degree of culpability or degree of involvement of petitioner in the felony murder, under the instructions given the jury entered the verdict that petitioner was guilty of the offense of First Degree Murder and imposed the death sentence. Thus, the jury did find that the defendant did personally and intentionally commit the murder of Kendell Inez Ashmore.

NOW THEREFORE, after having considered the petition filed herein and the briefs submitted by petitioner and the respondent, and after hearing oral argument,this Court finds that the trial court properly applied the doctrine of Res Judicata in petitioner's subsequent post-conviction application; and this Court further finds that the trial court properly distinguished *Enmund* v. *Florida*, both factually and legally, from petitioner's case.

IT IS THEREFORE THE ORDER OF THIS COURT, that the order of the Tulsa County District Court denying petitioner's Application for Post-Conviction Relief in that court's case number CRF-77-756, shall be AFFIRMED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of February, 1983.

Hez J. Bussey

HEZ J. BUSSEY, PRESIDING JUDGE

Tom R. Cornish

TOM R. CORNISH, JUDGE

Tom Brett

TOM BRETT, JUDGE

ATTEST:

Clerk

APPENDIX B

Opinion of the District Court for Tulsa County

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

LARRY LEON CHANEY,
Petitioner,

-vs-

THE STATE OF OKLAHOMA,
Respondent.

NO. CRF-77-756

DISTRICT COURT
FILED
AUG 9 1982
DON E. AUSTIN, COURT CLERK
STATE OF OKLAHOMA-TULSA COUNTY

ORDER

This matter comes on for consideration of Petitioner's "Application for Post-Conviction Relief" on July 13, 1982. The Petitioner was not personally present, his presence having been waived, being represented by Counsel, Mr. Allen Smallwood; and the State of Oklahoma was represented by Mr. David L. Moss, District Attorney, Tulsa County, Oklahoma, by Mr. James F. Raymond, Assistant District Attorney. The Court conducted hearing, and having entertained the arguments and authority presented by counsel, and being familiar with the records and files in this case and being familiar in these premises, therefore finds:

I.

RECORD FACTS

1. Petitioner was duly convicted by jury verdict and sentenced to death on September 22, 1977.

2. The Petitioner perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, cited as Chaney v. State, Okl.Cr., 612 P.2d 269 (1980), reh.den., (9-12-80), wherein the Court of Criminal Appeals affirmed the Petitioner's conviction and sentence of death.

3. Thereafter Petitioner sought review in the Supreme Court of the United States, by way of writ of certiorari, which was denied by that Honorable Court, Chaney v. Oklahoma, __ U.S. __ 101 S.Ct. 1731, __ L.Ed.2d (3-23-81).

4. On April 3, 1981, Petitioner filed his first Application for Post-Conviction Relief under the auspices of 22 O.S., §1080 et seq. Thereafter, and subsequent to hearings in the matter, the District Court of Tulsa County entered "Order Denying Application for Post Conviction Relief."

5. The Petitioner appealed said order to the Court of Criminal Appeals of the State of Oklahoma, which resulted in that Honorable Court's entry of "Order Affirming Denial of Post-Conviction Relief" on November 12, 1981, in Case No. PC-81-345.

6. From the Court of Criminal Appeals' denial of post-conviction relief, the Petitioner again petitioned the United States Supreme Court for review by way of writ of certiorari, which the Supreme Court denied on April 5, 1982.

7. Thereafter Petitioner filed petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Oklahoma, No. 82-C-625-B. Therein, the Court dismissed Petitioner's Petition for Writ of Habeas Corpus on June 25, 1982, under the authority of Rose v. Lundy, __ U.S. __, 102 S.Ct. 1198, __ L.Ed.2d __ (1982).

8. The Petitioner next filed the instant Application for Post-Conviction Relief, on June 28, 1982, acknowledging therein at page 3, paragraph V that this is his second such application for post-conviction relief.

9. To the instant application the State of Oklahoma filed its Response, alleging the bar of the doctrine of Res Judicata, 22 O.S., §1086, on July 2, 1982. Also, on July 2, 1982, the United States Supreme Court entered its decision in Enmund v. Florida, __ S.Ct. __, 31 Cr.L. 3149 (No. 81-5321, 7-2-82). Thereafter, on July 7, 1982, a hearing was conducted by the Court, at which Counsel Smallwood and Raymond were present and presented argument and authority, and at the conclusion of which the Court allowed Petitioner until July 13, 1982, to amend his Application for Post-Conviction Relief (if he so desired) to demonstrate in what manner and to what extent the Enmund case served to avoid the

bar of Res Judicata, in light of Petitioner's specific record acknowledgment that the present proceeding is his second Application for Post-Conviction Relief.

10. On July 13, 1982, the court conducted further hearing, and again entertained argument and presentation of authority of counsel. As a result of said hearing, Petitioner Chaney's Second Application for Post-Conviction Relief was overruled and denied, for reasons set forth herein.

II.

THE BAR OF RES JUDICATA

As has been noted herein, the State of Oklahoma's Response interposed the bar of the Doctrine of Res Judicata, which is appropriate under Oklahoma Statute 22 O.S., §1086,[1] and governing case law.[2]

1/. which provides:

> "All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application."

2/. These authorities include: Ellington v. Crisp, Okl.Cr., 547 P.2d 391 (1976); Harrell v. State, Okl.Cr., 493 P.2d 461 (1972); Maines v. State, Okl.Cr., 597 P.2d 774 (1979); White v. White, Okl., 607 P.2d 700 (1980); Gibson v. State, Okl.Cr., 491 P.2d 773 (1971); Grimes v. State, Okl.Cr., 512 P.2d 231 (1973); Horton v. State, Okl.Cr., __ P.2d __ (P.C. 77-629, 1977); Tiffey v. State, Okl.Cr., __ P.2d __ (P.C. 77-605, 1977); Morrison v. State, Okl.Cr., __ P.2d __ (P.C. 77-605, 1977); Hall v. State, Okl.Cr., __ P.2d __ (P.C. 77-853, 1977); Hardin v. State, Okl.Cr., __ P.2d __ (P.C. 78-432, 1978); Blozy v. State, Okl.Cr., __ P.2d __ (P.C. 78-609, 1978); Linebarger v. State, Okl.Cr., __ P.2d __ (P.C. 76-841, 1978); Walters v. State, Okl.Cr., __ P.2d __ (P.C. 78-628, 1978); Castleberry v. State, Okl.Cr., 590 P.2d 697 (1979); Brinlee v. State, Okl.Cr., 544 P.2d 817 (1970); Tate v. State, Okl.Cr., 489 P.2d 501 (1971); Speigel v. State, Okl.Cr., __ P.2d __ (P.C. 77-546, 1977); Smith v. State, Okl.Cr., 546 P.2d 1351 (1976); Poke v. State, Okl.Cr., __ P.2d __ (P.C. 77-648, 1977); Padillow v. State, Okl.Cr., __ P.2d __ (P.C. 76_14, 1976); Lamb v. State, Okl.Cr., __ P.2d __ (P.C. 78-212, 1978); Polk v. State, Okl.Cr., __ P.2d __ (O-78-332, 1978).

The Court, therefore, does find and so hold that the Doctrine of Res Judicata operates to bar Petitioner from presently raising and attempting to litigate matters which either have been raised by him, or could and should have been raised by him in the course of his previous direct appeal, post-conviction action and second appeal.[3] In that the Court of Criminal Appeals has twice reviewed this case on appeal, this Court is bound at this juncture by the doctrine of "law of the case" to the extent that res judicata bars the instant application, e.g., State ex rel. Burk v. Oklahoma City, Okl., 556 P.2d 591 (1976); Berland's Inc. of Tulsa v. Northside Village Shopping Center, Inc., Okl., 447 P.2d 768 (1968); Ada Coca-Cola Bottling Company v. Asberry, Okl., 242 P.2d 417 (1952); Pyle v. Pennington Grocery Company, 101 P.2d 847 (1940); Schneider v. Decker, Okl., 291 P. 80 (1930); Take v. Woodruff, Okl., 300 P. 698 (1931); Davis v. Baum, Okl., 133 P.2d 889 (1943); Grayson v. Smith, Okl., 138 P.2d 530 (1943); Marshall v. Cantrell, Okl., 236 P.2d 262 (1951). The necessary compliance with the appellate court's opinion and mandate applies to all matters which were decided either expressly, or by necessary implication by the appellate court, Cherokee Nation v. State of Oklahoma, 461 F.2d 674 (10th Cir., 1974), cert.Den., 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489; appeal after remand, 490 F.2d 521, cert. den., 94 S.Ct. 3070.

Therefore, the Court finds that the allegations of Petitioner's present Application found at Paragraph IV (page 3) are of such a nature that they are barred by Res Judicata, for reasons above-stated, unless and to the extent Petitioner's citation of Enmund v. Florida, supra, (1) constitutes an intervening change in the law, and (2) is applicable to the facts and circumstances presented herein.

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[3] The Court notes that the Order Denying Post-Conviction Relief entered on July 7, 1981, made specific findings at that time (Paragraph III, pp. 2-3) regarding the res judicata bar. The Court now rules, again, that said doctrine acts as a bar to the matters raised herein by Petitioner, though there is authority to the effect that Petitioner has "no standing" to file a second application for post-conviction relief, Linebarger v. State, supra; in that such issues "... are not properly before the court," Walters v. State, and Hardin, both supra.

III

THE APPLICABILITY OF *ENMUND V. FLORIDA*

The Court finds that *Enmund* v. *Florida*, supra, would constitute intervening change in the law and, in that sense, thereby sufficiently excuses Petitioner from earlier raising same, 22 O.S., §1086. However, the Court further finds, for reasons set forth below, that *Enmund* is distinguishable in both factual and legal content from the instant case, and therefore does not afford Petitioner support for the relief presently sought by him, even assuming, *arguendo*, that *Enmund* will at some future date be granted retroactive effect, and thus be made chronologically applicable to these 1977 circumstances.[4]

The Court notes this clear and precise statement of the United States Supreme Court in *Enmund*, __ S.Ct. __, 31 Cr.L. at page 3150:

> "As recounted above, the Florida Supreme Court held that *the record supported no more than the inference* [sic] that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. *This was enough* under Florida law to make Enmund a *constructive aider and abettor* and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence *that he did not himself kill and was not present at the killings*; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that the imposition of the death penalty *in these circumstances* [sic] is inconsistent with the Eighth and Fourteenth amendments. (Emphasis added).[5]

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[4] 4/. The Court does note in this regard that the act of murder for which Petitioner was convicted occurred in March 1977 and Petitioner was tried that same year, but the *Enmund* decision was handed down in July of 1982, and does not state that it is to be given retroactive effect. The Court presumes, as it must, that *Enmund* is of prospective application only.

[5] 5/. Noteworthy in this regard is footnote 2, at 31 Cr.L. 3150 wherein the Supreme Court noted that *"...the only supportable inference* with respect to Enmund's *participation was that he drove the getaway car*," but that was irrelevant to the issue before the Court, since the Florida Supreme Court had earlier held that *"...driving the escape car was enough* to warrant conviction *and the death penalty*..."

In its statutory analysis, The Supreme Court noted at 31 Cr.L. 3152, footnote 15,

> "Three other states -- Idaho, Okla. [sic], and S.D. -- allow a defendant who does not kill or actually kill to be executed only where other aggravating circumstances are present, and in those states the felony murder itself cannot serve as an aggravating circumstance." (Emphasis added)

Enmund, then, stands for this proposition:

> "...in cases such as this one [sic] where the defendant did not commit [sic] the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder..." (at 31 Cr.L. 3152, Emphasis added)

the death penalty may not stand. Indeed,

> "Petitioner's argument is that because he did not kill [sic], attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him.". (At 31 Cr.L. 3153, Emphasis original and supplied).

Said the Supreme Court,

> "...it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others [sic], but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (at 31 Cr. L. 3153, Emphasis Added).

By way of distinction, the Court notes that in the instant case, Petitioner Chaney was, according to all material evidence presented, the one and only actor herein. Thus not only was Petitioner not himself an accomplice or inferential accomplice to the murder by others, but this record in its entirety is devoid of any competent, material evidence upon which to infer, much less establish, that he himself was merely waiting in the wings while some "...mysterious second person..."[6] actually strangled the victims in this case.

The only evidence presented to the jury demonstrated to the jury's satisfaction, beyond a reasonable doubt, that the theory

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6/. Chaney v. State, Okl.Cr., __ P.2d __, "Order Affirming Denial of Post-Conviction Relief" (P.C. 81-345, 11-12-81), at page 1. As a point of clarification the Court does note that no affirmative proof offered by Petitioner Chaney demonstrated that any other person committed these acts of murder.

of the State of Oklahoma was accurate; that is to say, the jury found in the trial of this case, first, that Petitioner Larry Chaney himself, personally, committed the intentional act of murder herein, and only secondarily, that those prime acts were accomplished in the course and within the context of the felony crime of kidnapping for purposes of extortion.[7]

There was no evidence presented in this case which indicated the involvement of any person other than Petitioner Chaney, and therefore the instant facts are wholly distinguishable from those presented in *Enmund*. In the *Enmund* case, all the facts from the very outset demonstrated the complicity of *three* persons, where the actual murderer, the "triggerman" (Sampson Armstrong) told a witness that *he* had shot the victim in the course of the robbery, and which evidence was corroborated by other trial testimony, *Enmund* v. *State*, Fla., 299 So.2d 1362, 1365 (1981). In the Supreme Court's estimation, again, the record "...supported no more than the inference..." that Enmund remained in the getaway car. Similarly, in *Enmund*, "...the prosecutor maintained in his closing argument *that 'Sampson Armstrong killed* [sic] *the old people*.' " (*Enmund* v. *Florida*, at 31 Cr.L. 3149, Emphasis added).

In the instant case no evidence[8] was presented which could have established that any person other than Petitioner Chaney committed the act of murder. Thus the Court finds that neither evidence, nor fair inference, in this case even remotely suggests that Larry Chaney was other than the premeditated, personal, and actual murderer of Kendal Inez Ashmore.

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[7] In light of the fact that Petitioner has not sought to distinguish the relative risk of harm inhering in Edmund's act of robbery from that presented, *per se*, by the act of kidnapping for purposes of extortion, the Court reserves opinion thereon. Please compare *Enmund's* statistical discussion of the relatively low probability that commission of the crime of robbery will result in homicide, at 31 Cr.L. 3153-3154.

[8] The Court is mindful that Petitioner's first Application for Post-Conviction Relief raised issues vaguely concerning a second person's involvement. The court has heretofore ruled upon the relative exculpatory nature and materiality of those contended facts, and being affirmed by the mandate of the Court of Criminal Appeals (November 12, 1981), neither the Court nor Petitioner is at liberty to now re-examine the proposed relation-Petitioner is at liberty to now re-examine the proposed relation- ship between those facts and the proposition Petitioner now seeks to establish. The Court does observe that neither at trial nor his first Post-Conviction proceeding has Petitioner ever been able to substantiate through evidence in this record that any other person was involved in the act of murder, Petitioner's *ipse dixit*, non-evidentiary assertions notwithstanding. It is noteworthy that in course of the first Post-Conviction hearings conducted before this Court in 1981, the Petitioner, as movant, did not apparently then see fit to call the so-called "non-disclosed" witnesses to the stand for examination, even to rebut the otherwise unfavorable testimony of the District Attorney, S. M. Fallis, Jr., to the contrary.

The Court further finds that the pleading instrument, the information upon which the State's case revolved; the evidence presented to the jury; and the instructions given to guide them, when taken in conjunction all conclusively demonstrate to the Court's present satisfaction that the Petitioner, Larry Chaney, wilfully and without authority of law, with a premeditated design did personally kill Kendall Inez Ashmore by choking and strangling her to death, being then and there engaged in the commission of the crime of kidnapping for the purpose of extortion. As the Court's instructions to the jury indicated, the State's information alleged not only that Petitioner Chaney did unlawfully and with premeditated design effect the death of Kendal Inez Ashmore, but also that this act was done while Petitioner Chaney was engaged in commission of kidnapping for extortion.[9] The jury was instructed of the burden of the State of Oklahoma to prove these material allegations.[10] The jury was further instructed that Petitioner Chaney could not be convicted of murder unless the victim's death "...and the fact of the killing by the accused..." were each established as independent facts.[11] Instruction Number 5 advised the jury that regardless of malice, a person commits the crime of Murder in the First Degree "...when he takes the life of a human being...", in the commission of a kidnapping. This instruction in its totality, advised the jury that if it found Petitioner Chaney committed the homicide, the fact that he was engaged in the felony of kidnapping merely served to remove from the State the burden of proving a premeditated design to kill the deceased. It required that before the jury could convict Petitioner Chaney, the jury was required to find beyond a reasonable doubt

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9/. "Statement of the Case and Instructions to the Jury".

10/. Instruction #1.

11/. Instruction #2, cf. 21 O.S., §693.

that, (1) Petitioner Chaney committed the homicide, (2) that this homicide was committed in an unlawful, felonious and premeditated manner, or (3) that he committed the homicide while engaged in commission of kidnapping for the purpose of extortion.[12] In that the jury was instructed on first degree manslaughter[13] but instead found Petitioner, the sole defendant herein, guilty of First Degree Murder, the Court can only conclude that the jury, as presumed to discharge its sworn duty, in fact determined through all the instructions that Petitioner Chaney himself committed the act of murder. Even under the circumstances most favorable to Petitioner, must be interpreted to mean that the jury found Petitioner committed this murder either with premeditation or with the substituted malice which Petitioner Chaney demonstrated in so committing murder in the commission of a felony kidnapping. Thus, the Court finds the Enmund circumstances wholly distinguishable and inapposite.

The Court does note, for the record, that it conducted the trial herein, and that it has reviewed the record numerous times during the course of the Petitioner's Application for Post-Conviction Relief. The Court remains firmly convinced of the sufficiency of the evidence by which the jury found Petitioner Chaney guilty of First Degree Murder, and the Court remains equally unconvinced of the Petitioner's vague, yet non-evidentiary, assertions of a mysterious second person suggested to be involved in the murder of Kendal Inez Ashmore. In the Court's opinion, the evidence was in fact overwhelming against Petitioner albeit circumstantial in nature. At no time has the Court been presented with evidence to the contrary, or otherwise even tending to indicate the complicity of any confederate, and this notwithstanding that Petitioner was provided ample opportunity to do so.[14]

12/. See Instruction #7.

13/. See Instruction #8

14/. See Transcript of Proceedings conducted on May 1, 1981, pp. 31-39, wherein Counsel for Petitioner admitted he had spoken with the proposed witnesses, but that he did not choose to call them to testify on Petitioner's behalf.

From start to finish, no evidence has been presented which would even tend to persuade this Court that any person but Petitioner Larry Leon Chaney murdered Kendal Inez Ashmore.

In making such strong, even to the superlative, statements herein, the Court is fully cognizant of the supreme importance of the outcome of this case to both the State of Oklahoma and to Petitioner Chaney personally. That is precisely why the Court feels compelled to state for the record the Court's observation of the sufficiency of the evidence herein.

THEREFORE, for the above and foregoing reasons, the Court finds and does so hold that the Petitioner is barred by the Doctrine of Res Judicata from further proceeding herein. The Court further finds, however, that Enmund v. Florida, supra, does constitute intervening authority, but that it is neither applicable to the facts and circumstances presented in this case, nor does it compel or even suggest the grant of any relief sought herein by Petitioner Chaney.

Therefore, this Second Application for Post-Conviction Relief of Petitioner, Larry Leon Chaney, is overruled and denied, with exception allowed.

Done in open Court this 13th day of July, 1982.

JAY D. DALTON
DISTRICT JUDGE

APPROVED AS TO FORM:

Allen M. Smallwood
Allen Smallwood
Attorney for Petitioner

James F. Raymond
James F. Raymond
Assistant District Attorney

[illegible] E. Austin, Court Clerk for Tulsa County, [illegible] certify that the foregoing is a [illegible] instrument here[illegible] Court [illegible] of Tulsa County [illegible]
9 day [illegible] 19 82
[illegible] E. Austin
Court Clerk

APPENDIX C

Motion to Produce

DISTRICT COURT
FILED
APR 1 1977
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, Plaintiff,	)	
-vs-	)	Case No. CRF 77-755 CRF 77-756
LARRY LEE CHANEY, Defendant.	)	

MOTION TO PRODUCE

Defendant moves that the State be required to disclose and, if a tangible item is involved, to produce for inspection and/or copying by the Defendant all material in the possession and control of the State in the future, which material may be favorable or exculpatory to the Defendant, which could reasonably affect the determination of the Defendant's guilt or innocence, reduce punishment, is relevant to the subject matter of the charge, or which may in any manner assist the Defendant. Disclosure and production of the material herein requested is to be made without regard to whether the material to be disclosed and produced is considered by the State to be admissible at the trial, and whether or not the State feels the material is exculpatory in nature.

Defendant requests that disclosure and production of said material include, but not be limited to, the following:

OR 1. Statements of all persons who have been interviewed by an agent of the State of Oklahoma, an investigator or member of the Tulsa Police Department or the Tulsa County Sheriff's Office or any other governmental agency in connection with the subject matter of this case, whether or not the State intends to call them to testify at trial, and whether or not,

OR (a) the statement, if in writing, has been signed or approved by the witness.

OR (b) the statement relates to the proposed subject matter of the witness to be called at trial.

OR (c) the statement is merely a summary of the facts related to the interviewer.

OR 2. Stenographic recordings or transcriptions of any oral statement made by any person to an agent of the State, an investigator, a police officer at the Tulsa Police Department, a member of the Tulsa County Sheriff's Office, or a member of any other governmental agency in connection with the subject matter of the case whether or not,

OR (a) the stenographic recordings or transcriptions are a substantially verbatim recital of teh statement, or

OR (b) the statement was recorded contemporaneously with its making, or

OR (c) the statement relates to the proposed subject matter of the testimony of the witness to be used at trual.

OR 3. The transcript of any statement given to the District Attorney's Office during their investigation concerning the subject matter herein by any persons, whether or not the State intends to call them at the time of the trial, and whether or not the statements were recorded.

OR (a) In addition, transcripts of all polygraph proceedings given to the above named Defendant or any witness or perspective witness, to include all questions asked and all answers elicited by the above mentioned persons.

OR (b) in addition, a copy of the polygraph chart results from which the polygraph examiner formed his opinion.

Complied 4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

Complied 5. The prior criminal record of all persons the State intends to call at time of trial, including indictments, convictions, acquittals, or pending charges. This information is required by the defense to determine whether bias or prejudice exist on the part of the State witnesses and to impeach the credibility of said witnesses if any of them have been convicted of a felony or a misdemeanor involving moral turpitude.

SUST. 6. Any material relating to the competency of witnesses to be called by the State, such as a history of mental illness or psychiatric care or civil or criminal commitment to a State or private mental hospital.

SUST. 7. Written or recorded statements or a summary of any such statements made by the Defendant in this case or copies of any statements, admissions, confessions, or declarations against interest verbatim or otherwise which may have been made by the

C2

Defendant and the names of the persons taking such statements.

OR 8. The original report of the arresting officer(s) in this case.

Just. 9. Any and all other evidence now in the custody of the District Attorney's Office, the Tulsa Police Department, the Tulsa County Sheriff's Office, or any other agency of the State which may be favorable to the Defendant or exculpatory.

granted 10. All reports of a scientific nature, and the subject matter of these reports, which have been prepared by an expert, technologist, identification-officer, or other scientific authority pertaining to any instrument, substance or means allegedly used in the commission of the crime and any report made or which may be made which relates to any fingerprints, ballistics reports, handwriting exemplars, photographs of the crime scene together with the prints, exemplars, photographs or and other scientific material relating to this case which may be exculpatory in nature, or favorable to the Defendant.

granted 11. Any physical or tangible objects in the possession of the District Attorney's Office, the Tulsa Police Department, the Tulsa County Sheriff's Office, the Oklahoma State Bureau of Investigation, or the Federal Bureau of Investigation, or any other governmental agency including, but not limited to, items taken from the Defendant's person or his property, together with any written reports whether of a scientific nature or not, that the State intends to use to connect or identify this Defendant with this alleged crime.

OR. 12. Disclosure of the identity of any informant used by the Tulsa Police Department or expected to be used in the procurement of or use of evidence expected to be used against the Defendant.

OR. 13. Any and all oral statements made to any member of the Tulsa Police Department or District Attorney's staff or any other law enforcement official.

Premature 14. Any inconsistencies between the testimony of State' witnesses at the preliminary hearing or trial of the case and stat ments or reports of statements included within the District At-

C3

torney's case file.

Premature 15. The exact date and time of the alleged kidnapping and alleged murder if known. If not known, any and all information in possession of the State of Oklahoma or any governmental body that would shed light upon the date and time of the alleged crimes in question.

The Defendant therefore respectfully requests the Honorable Court to require the State of Oklahoma to produce all material now known or which may become known, or which through the exercise of due diligence may be learned from the investigating officers or witnesses in the case, which is exculpatory in nature or favorable to the accused, or which may lead to exculpatory material or which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefor.

Defendant further moves this Court to conduct an in camera inspection of the District Attorney's file and order that a neutral and a detached judicial officer may determine the existence or nonexistence of such material.

Attorney for Defendant
Allen M. Smallwood
1717 South Cheyenne
Tulsa, Oklahoma 74119
918-585-9837

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above and foregoing Motion to Produce was delivered to the District Attorney in and for Tulsa County, Oklahoma, on the ______ day of __________________, 1977.

DISTRICT COURT
FILED
APR 1 1977
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

Attorney for Defendant
Allen M. Smallwood

C4

APPENDIX D

FBI Witness Reports

FD-204 (Rev. 7-15-75)

FEDERAL BUREAU OF INVESTIGATION

REPORTING OFFICE	OFFICE OF ORIGIN	DATE	INVESTIGATIVE PERIOD
OKLAHOMA CITY	OKLAHOMA CITY	4/5/77	3/17/77 - 4/1/77

TITLE OF CASE

CHANGED
LARRY EUGENE CHANEY, aka 149, 57, 58
Larry L. Chaney,
Larry Lee Chaney,
Larry Leon Chaney,
Lee Leonard Chaney;
KENDAL INEZ ASHMORE (Deceased) 43, 77
VICTIM;
KATHY ANNE BROWN (Deceased) -
VICTIM

REPORT MADE BY
SA [redacted] B7C

TYPED
jlb

1, A, 3, 7 7

CHARACTER OF CASE

KIDNAPING

Title marked changed to include correct spelling of first name and to include middle name of KENDAL INEZ ASHMORE and to add alias of subject as LARRY LEE CHANEY.

REFERENCES:

Oklahoma City telephone calls to the Bureau 3/17/77 and 3/18/77.
Oklahoma City teletypes to the Bureau 3/18, 19, 22 and 23/77.

- P -

ADMINISTRATIVE:

Although there is no apparent violation of the Federal Kidnaping Statute involved in this matter, upon the recommendation of

ACCOMPLISHMENTS CLAIMED ☒ NONE

CONVIC.	PRETRIAL DIVERSION	FUG.	FINES	SAVINGS	RECOVERIES	ACQUIT-TALS

CASE HAS BEEN:
PENDING OVER ONE YEAR ☐ YES ☒
PENDING PROSECUTION OVER SIX MONTHS ☐ YES ☒

APPROVED
SPECIAL AGENT IN CHARGE

COPIES MADE:

1 - Bureau
1 - USA, Tulsa
1 - Tulsa County District Attorney
S. M. FALLIS, JR.
2 - Oklahoma City (7-1327)

DO NOT WRITE IN SPACES BELOW

7-17007-15

24 APR 11 1977

REC

ST-

DE-

Notations

DATA PROC.

Dissemination Record of Attached Report

Agency				
Request Recd.				
Date Fwd.				
How Fwd.				
By				

24 APR 28 1977

COVER PAGE

U. S. Attorney NATHAN G. GRAHAM, NDO, Tulsa, a copy of this report is being furnished to Tulsa County District Attorney S. M. FALLIS, JR. for his assistance in the prosecution of subject in local court on charges of Kidnaping for Extortion and Murder.

LEAD:

OKLAHOMA CITY

AT TULSA, OKLAHOMA. Will follow local prosecution.

B*
COVER PAGE

FEDERAL BUREAU OF INVESTIGATION

1.

Date of transcription 3/24/77

[redacted]

b7C
D

He is presently caring for stock in the area of 91st Street and Memorial Avenue. He advised he rents this pasture land which he noted is located next to an unoccupied produce building and an abandoned house. He states he makes daily trips to this area for the purpose of tending to his stock.

[redacted] advised at approximately 7:30 A.M. this date he went outside of his residence which is located about one-quarter mile from the above intersection and fed his stock. He stated he then drove up to the rent pasture and as he turned into the gate he noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building. [redacted] stated this occurred between 8:00 and 8:30 A.M. and was positive on the time.

[redacted] stated the truck had just driven in and the man opened the door when he first observed it and therefore he could not tell the direction from which it had been driven. He stated the driver passed in front of the parked truck and walked over to a car that was waiting for him. He advised the car, which he could only describe as being black, was parked on the east side of the building facing south and he could only see a small part of the front end. He advised he did not know if there was another individual in the black car but assumed there was but could not give a description. He advised he saw all of this as he was pulling through the gate and did not actually see the truck driver get into the car but the next time he looked in that vicinity both the driver and the car was gone. He stated he did not know in what direction they had gone but he believes if they had driven west he would have observed them.

[redacted] advised the truck he observed is the truck that is still parked there at the present time in the same location.

Interviewed on 3/18/77 at Tulsa, Oklahoma File # Oklahoma City 7-1327

by SA [redacted]
SA

b7C

Date dictated 3/22/77

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

30

He advised the man driving this truck which he observed from approximately 50 yards is a white male, age unknown but neither real old or young, 6', slender build, wearing a light-weight jacket and a hat. No other description recalled.

31

1.
OC 7-1327
JWF:RLM:ca

The following investigation was conducted by b7C

SA [redacted]

AT TULSA, OKLAHOMA

[redacted] advised he was riding home from school on Thursday, March 17, 1977, on the Jenks Public School Bus and came to the intersection of 91st and Memorial, where the bus turns South on Memorial before arriving at East 98th.

[redacted] advised the time was approximately 4 or 4:30 P.M. and he noticed a new looking red pickup truck with a white stripe across it. He said the reason he noticed this truck was because it was shiny red and he observed a "clip-on" type CB antenna on the driver's side of the truck. [redacted] this truck was parked on the southside of the truck. [redacted] this truck was parked on the south side of the Bixby Produce Building, next to it, with the nose of the truck facing west. He further explained the truck was parked near the awning which hangs over the south side of the building.

[redacted] said he did not observe anyone near the truck at that time. He continued that he saw the truck again in the same place at approximately 5:30 P.M. when he was going to soccer practice the same day. [redacted] mother, [redacted] was present and advised [redacted] was familiar with pickup trucks, and said she was confident if he said the truck was red, she would believe it.

[redacted] advised the bus driver was [redacted] who drives bus No. 12 for the Jenks Public School and stated she would contact [redacted] and have her get in touch with the FBI. b7C,D

The following investigation was conducted by b7C

SA [redacted] b7C

On March 21, 1977, [redacted] telephonically advised that she drives the school bus for the Jenks Public School, which passes the intersection of East 91st and South Memorial. On the afternoon of March 17, 1977, she stopped at this intersection while she was driving on East 91st. There is a large amount of traffic at this intersection and she had to sat there for some period of time until she could turn onto South Memorial. She did not observe any vehicles parked in this area because she was so busy watching traffic. However, she was parked there attempting to turn onto Memorial for a long enough period of time that any of the children on the school bus could have accurately observed any vehicle parked there.

[redacted] stated that a school bus for the Union School System also turns at 91st and Memorial. This bus is unloaded of school children at the time it passes this intersection and the driver would have more time to observe things in the area. b7C

33

FD 302 (REV. 11-27-70)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/30/77

1

[redacted] b7CD

[redacted] advised she lives in the vicinity of the ASHMORE residence and she is acquainted with Mrs. ASHMORE and sees her frequently in the vicinity of their residence. She advised she also recognizes the vehicles owned by the ASHMORE's. [redacted] stated that Payton's Grocery Store is located at 91st and Union Streets which is patronized by both Mrs. ASHMORE and herself. b7C D

She advised at approximately 4:10 P.M. on Thursday, March 17, 1977, she recognized Mrs. ASHMORE as being in a blue and white pickup truck which she had previously known to be driven by the ASHMORE's. She advised this occurred in front of the Well's Grocery Store, 301 E. Main, Jenks, Oklahoma. She advised she pulled in to the parking lot in front of Well's Grocery Store and when she got out of her car she glanced over to a distance of about 8 or 9 parking spaces and saw Mrs. ASHMORE sitting in a truck with two other people. She advised Mrs. ASHMORE was under the steering wheel and a man was sitting next to her with a female on the far side. She advised she could not describe either of the other two individuals nor could she describe Mrs. ASHMORE's wearing apparel.

She advised she had parked facing the street and Mrs. ASHMORE was parked facing the store west of her. She advised she could not see that there was any problem nor did she notice Mrs. ASHMORE looking at her or talking to anyone in the truck. She advised she just glanced at the truck, recognized Mrs. ASHMORE and turned to enter the store. She advised she came out approximately ten minutes later and the truck was gone.

She advised there were no other vehicles parked between her car and Mrs. ASHMORE's truck.

Interviewed on 3/22/77 at Tulsa, Oklahoma File # Oklahoma City 7-1327

by [redacted] b7C Date dictated 3/28/77

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency;

She stated she is certain of the time in view of the fact she had picked her son up at school at 4:00 P.M. and drove straight to the store. She advised while in the store parking lot she recalled two firetrucks and two police cars with sirens went by the store.

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APPENDIX E

Opinion of the Oklahoma Court of Criminal Appeals
November 12, 1981

NOV 12 1981
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY LEON CHANEY,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

No. PC-81-345

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Larry Leon Chaney has appealed from an order of the District Court of Tulsa County, denying his application for post-conviction relief in Tulsa County Case No. CRF-77-756. He contends that he was denied a fair trial because the State suppressed exculpatory evidence.

In the appellant's pretrial discovery motion he asked for the names "of all persons who may have some knowledge of the facts involved in the instant case." The district court granted that motion. Now, in his post-conviction proceeding, the appellant alleges that three people interviewed by investigating officers gave statements which would tend to exculpate him. He says that he was not furnished this information before his trial, and asks that a new trial be ordered.

Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the fact that the prosecutor was acting in good faith in failing to disclose evidence is irrelevant. What matters is whether the evidence is material to guilt or punishment. After examining the exhibits provided by the appellant and the transcript of the post-conviction hearing held in the district court, this Court concludes that the evidence raised was not material.

Even if the appellant's evidence was viewed in the light most favorable to him, it does not tend to exculpate him. Instead, it merely tends to suggest that the appellant was not the only person involved in the kidnappings and murders. If a mysterious second person were the one who actually strangled the victims, the appellant must still be considered a principal in the murders.

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the district court denying post-conviction relief should be, and same hereby is, affirmed.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT this 12th day of November, 1981.

Tom Brett

TOM BRETT, PRESIDING JUDGE

H. J. Bussey

HEZ J. BUSSEY, JUDGE

Tom R. Cornish

TOM R. CORNISH, JUDGE

ATTEST:

Robert T. Eliard Jr.

Clerk

82-6686

Office-Supreme Court, U.S.
MAY 4 1983
ALEXANDER L. STEVAS.

RECEIVED
MAY 6 - 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JUN 2 PAGE 10

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-v.-

STATE OF OKLAHOMA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner, Larry Leon Chaney, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Oklahoma State Penitentiary in McAlester, Oklahoma. Mr. Chaney's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

John Charles Boger
JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-against-

STATE OF OKLAHOMA,

Respondent.

AFFIDAVIT

STATE OF NEW YORK) : ss:
COUNTY OF NEW YORK)

JOHN CHARLES BOGER, being duly sworn, states:

1. I am an attorney for Larry Leon Chaney, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Chaney's motion for leave to proceed *in forma pauperis*. My representation of Mr. Chaney is without remuneration.

2. Mr. Chaney is presently in the custody of the State of Oklahoma and is not immediately available to sign an *in forma pauperis* affidavit. Such an affidavit has been sent to Mr. Chaney and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Chaney is attached hereto.

3. I am informed and believe that because of his poverty, Mr. Chaney is unable to pay the costs of this cause or to give security for same.

4. I believe that Mr. Chaney is entitled to redress in this action.

John Charles Boger
JOHN CHARLES BOGER

Subscribed and sworn to
before me this 4th day of May, 1983.

Judith A. Reed
NOTARY PUBLIC
JUDITH A. REED
Notary Public, State of New York
No. 60-4040840
Qualified in Westchester County
Commission Expires March 30, 1984

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY, Petitioner, -v.- STATE OF OKLAHOMA, Respondent.	:	AFFIDAVIT

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) : ss:

LARRY LEON CHANEY, being duly sworn, deposes and says in support of his motion for leave to proceed without being required to prepay costs or fees and to proceed *in forma pauperis*:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to redress.

5. The nature of said cause is briefly stated as follows:

I was convicted in the District Court for Tulsa County, Oklahoma, a trial court of the State of Oklahoma, of murder and was sentenced to death. I am being held at the Oklahoma State Penitentiary at McAlester, Oklahoma. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction was imposed upon me in violation of my constitutional rights.

LARRY LEON CHANEY

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) : ss:

The foregoing affidavit of Larry Leon Chaney was subscribed and sworn to before me this day of

NOTARY PUBLIC

Office-Supreme Court, U.S.
FILED
MAY 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

LARRY LEON CHANEY,)
Petitioner,)
vs.) No. 82-6686
THE STATE OF OKLAHOMA,)
Respondent.)

AFFIDAVIT

STATE OF OKLAHOMA)
) ss.
COUNTY OF PITTSBURG)

I, LARRY LEON CHANEY, being duly sworn upon my oath, depose and state in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed *in forma pauperis*:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of filing fees; I own no real or personal property; I am incarcerated; unable to make bond; and receive no income from earning.

3. I am unable to give security for said costs.

4. Although my counsel has been paid certain sum in the past by my relatives, at the present time he is being paid sums only sufficient to maintain the out-of-pocket costs of pursuing my appeals and he is presently serving without remuneration.

5. I believe that I am entitled to relief under my petition for writ of certiorari.

6. The nature of said cause is briefly stated as follows:

I was convicted in the District Court of Tulsa County, Oklahoma, a trial court in the State of Oklahoma, of First Degree Murder while engaged in the act of kidnapping for purposes of extortion, and was sentenced to death. I am presently being held on death row at the Oklahoma State Penitentiary in McAlester, Oklahoma. I believe that errors were committed during the course of the trial of my case which consists of bad faith denial of production of exculpatory evidence by the respondent prior to the trial of my case, during the trial of my case, and since that time up and until the date of this Affidavit. I further believe that newly-discovered evidence after the trial of my case constitutes errors of a constitutional nature and that my conviction and death sentence were imposed upon me in violation of those constitutional rights by which I am aggrieved and seek redress. I further state that I am scheduled to be executed by lethal injection on June 24, 1983, at the Oklahoma State Penitentiary in McAlester, Oklahoma.

Larry L. Chaney

LARRY LEON CHANEY

STATE OF OKLAHOMA)
) ss.
COUNTY OF PITTSBURG)

I, Larry Leon Chaney, of lawful age and after having been first duly sworn upon my oath, state:

That I am the petitioner above named; that I have read the above and foregoing Affidavit; that I know of the contents thereof; that all the facts therein contained are true and correct to the best of my knowledge and belief.

Larry L. Chaney

LARRY LEON CHANEY

Subscribed and sworn to before me this 17 day of May, 1983.

James R. Eastham

Notary Public

My Commission Expires:

6-25-85

Office - Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS.
CLERK

No. 82-6686

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION
Counsel of Record

112 State Capitol Building
Oklahoma City, OK 73105
(405) 525-8550

ATTORNEYS FOR RESPONDENT

May, 1983

JUN 2 PAGE 10

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I. SINCE A PREVIOUS EVIDENTIARY HEARING REVEALED THAT THE NONDISCLOSED REPORTS WOULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL, PARTICULARLY IN VIEW OF THE FACT THAT THE PETITIONER'S ATTORNEY PERSONALLY SPOKE TO THE WITNESSES REFERRED TO IN THE REPORTS AND THEREAFTER DECLINED TO CALL THEM AS WITNESSES AT THE EVIDENTIARY HEARING, THE MANDATES OF UNITED STATES V. AGURS HAVE BEEN COMPLIED WITH AND THE PRESENT PETITION FOR WRIT OF CERTIORARI, WHICH PRESENTS ISSUES WHICH HAVE PREVIOUSLY BEEN PRESENTED TO THIS COURT, SHOULD BE DENIED. 8

II. THE HOLDING OF THIS COURT IN ENMUND V. FLORIDA DOES NOT PREVENT THE STATE FROM IMPOSING THE SENTENCE OF DEATH UPON A PARTICIPANT IN A MURDER WHERE, AS EVIDENCED BY THE ACTIONS OF THAT PARTICIPANT, HE, AT THE VERY LEAST, "CONTEMPLATED THAT LIFE WOULD BE TAKEN." 11

III. SINCE THE TRIAL COURT AND THE OKLAHOMA COURT OF CRIMINAL APPEALS BOTH APPLIED THE PRINCIPLES OF ENMUND V. FLORIDA AND FOUND THAT THE PRESENT CASE WAS FACTUALLY DISTINGUISHABLE FROM THAT IN ENMUND, NO ERROR WAS COMMITTED. 14

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28 U.S.C. § 1257(3) 2

QUESTIONS PRESENTED

1. Whether the nondisclosure of statements of purported witnesses, with whom the Petitioner's attorney spoke prior to a post-conviction evidentiary hearing and then declined to call to testify at that hearing, was violative of this Court's mandate in United States v. Agurs, 427 U.S. 97 (1976).

2. Whether this Court should grant certiorari to review the question stated above when it has declined to do so when the Petitioner brought this same issue before the Court in a previous Petition for Writ of Certiorari.

3. Whether this Court's holding in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982), should affect the death sentence imposed in this case given the involvement of the Petitioner in the kidnapping and subsequent murder of his victims.

No. 82-6686

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The Respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Oklahoma Court of Criminal Appeals in this case.

OPINIONS BELOW

The last opinion of the Oklahoma Court of Criminal Appeals is an unreported Order Affirming Denial of Post-Conviction Relief, Chaney v. State, No. PC-82-487 (Okl.Cr. February 3, 1983).

Previous to that is another Order Affirming Denial of Post-Conviction Relief, which was issued by the Oklahoma Court of Criminal Appeals on November 12, 1981, Case No. PC-81-345. This Court denied certiorari in that case on April 5, 1982, in Case No. 81-6016.

The original opinion of the Oklahoma Court of Criminal Appeals, a direct appeal in which the court affirmed the death sentence imposed by the district court, was issued on May 15, 1980, and is reported as Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980). This Court denied certiorari in that case on March 23, 1981, in Case No. 80-947.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on February 3, 1983. By order entered March 25, 1983, Justice White granted an application extending Petitioner's time to file a petition for writ of certiorari until May 4, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eight Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 21 O.S.Supp.1976, § 701.7, provides as follows:

> "A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> "B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.9, provides in part:

> "A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S.Supp.1976, § 701.10, provides as follows:

> "Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determin whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted

> before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11, provides as follows:

> "In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12, provides as follows:

> "Aggravating circumstances shall be:
>
> "1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
>
> "2. The defendant knowingly created a great risk of death to more than one person;
>
> "3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remunderation;
>
> "4. The murder was especially heinous, atrocious or cruel;
>
> "5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
>
> "6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or
>
> "7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13, provides as follows:

> "A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.
>
> "B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.
>
> "C. With regard to the sentence, the court shall determine:
>
> "1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> "2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and
>
> "3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> "D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.
>
> "E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
>
> "1. Affirm the sentence of death; or
>
> "2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.
>
> "F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

Larry Leon Chaney (hereinafter referred to as the Petitioner) was charged by Information in the District Court of Tulsa County, State of Oklahoma, with the crime of Murder in the First Degree in violation of 21 O.S.Supp.1976, § 701.7.

The Petitioner was convicted of murdering a woman nameed Kendal Inez Ashmore by strangulation. In the second stage, the State further introduced evidence that the defendant had also strangled a young woman named Kathy Ann Brown, who was a horse trainer in the employ of Mrs. Ashmore and who was kidnapped with Mrs. Ashmore.

The facts that the State presented at trial revealed that on March 17, 1977, the deceased's husband, Phillip Ashmore, left his residence for work. Mr. Ashmore was in the construction business; and he and his wife also were engaged in the business of raising Morgan horses at their residence, which was on a farm. Mr. Ashmore's wife, the decedent, Kendal Ashmore, came to his office at approximately 9:30 a.m. on March 17, 1977, and picked up the family pickup truck. Mr. Ashmore never saw his wife alive again.

Mr. Ashmore returned to his home later that afternoon and found that neither his wife nor the employee, Kathy Ann Brown, were there. After he rounded up the horses, Mr. Ashmore received a telephone call in which the caller stated that he had "got your old lady and that honky that works for you and I want a half million dollars in one hundred dollar bills." (Tr. 351). The caller promised to phone the next night with instructions regarding the delivery of the money. The caller also stated that, if anyone heard about the call, "I'll do to your wife what I did to that honky that works for you" (Tr. 351-352). Mr. Ashmore immediately called his attorney, who then contacted the Federal Bureau of Investigation. A recording device was then affixed to his telephone, but no more calls from the extortionist were received on that day.

The next day, March 18, Mr. Ashmore and his father-in-law secured the ransom money and returned to the Ashmore home. At approximately 7:00 p.m., a person with the same voice called again and directed Mr. Ashmore to take the money to a rodeo ground and leave it at a specified spot by 7:30 p.m. or his wife would be killed (Tr. 363). Shortly after that time, Mr. Ashmore delivered the money to the predesignated spot at the rodeo grounds. At approximately 9:30 p.m. the same day, he received another call from a man with the same voice who advised him that he had not left the money in the proper place, that he should get the money, and that he would receive another call the next night. The caller stated that if Mr. Ashmore did not do exactly what he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, motherfucker" (Tr. 373). Mr. Ashmore did not receive any more calls concerning his wife.

The call which was made at approximately 7:00 p.m. directing Mr. Ashmore to the rodeo grounds was traced to the Petitioner's telephone number at his residence. The call which was made at approximately 9:00 p.m. was traced to a service station phone booth. The Petitioner's palmprint was taken from the receiver handle on that telephone.

After receiving this information, the police set up surveillance at the Petitioner's home, which was within two (2) miles of the rodeo grounds where the ransom money was to be delivered; and on March 19, at 3:20 a.m., the police arrested the Petitioner and searched his house, looking for the victims or evidence of the victims' whereabouts.

A search of a wastepaper basked in the Petitioner's residence revealed torn-up pieces of paper which, when reassembled, contained the words, "Richard Elloit," 1:00 P.M." and "Thursday" and the number "299-9791" (Tr. 579). A note in Mrs. Ashmore's handwriting found at her home contained the words "1:00 o'clock, Thursday" and "Richard Eliot" (Tr. 384). The Ashmore's home telephone number, which was the number which the extortionist called, was 299-9791 (Tr. 342). A handwriting expert testified that the notations on the torn piece of paper found in the wastepaper basket in the Petitioner's residence were made by the Petitioner (Tr. 1199). Furthermore, the Petitioner's fingerprints were found on this note (Tr. 588-589).

Later that morning, at approximately 9:00 a.m. on March 19, the pickup in which Mrs. Ashmore had been driving was found at a location near south Tulsa. In the back of the pickup was found half of a piece of paper. According to an FBI expert, the other half of the paper was the one which was found in the Ashmores' home as referred to above. The note found in the Ashmore home also gave the location where the pickup truck was found on the morning of March 19.

Finally, on March 22, 1977, the body of Mrs. Ashmore was found in a shallow grave on the Petitioner's property near the City of Sallisaw, a town approximately 100 miles east of Tulsa. Her body was bound and gagged and she had been strangled with a strip of a towel.

The State also presented witnesses who placed the Petitioner in the area near where Mrs. Ashmore's body was found on the day of the kidnapping, including a neighbor of the Petitioner who saw Petitioner driving his truck on that property late on the afternoon of the kidnapping. Furthermore, on the afternoon of the kidnapping, the Petitioner was observed in a convenience store near Sallisaw, within five or six miles of the burial site, by a witness who testified that the defendant appeared dirty and had dirt stains on his pants from the knees down.

Furthermore, on the night before the kidnapping, the Petitioner checked into a motel near Sallisaw. The operator of the motel testified that, after the Petitioner checked out the next morning, he found that three bath towels were missing and that there was red clay-like mud on the bedspread (Tr. 659).

The property where Mrs. Ashmore's body was buried was being rented by the Petitioner, who was building a house at this location. A pick-ax which was found at the Petitioner's residence when he was arrested was found to have soil particles on it similar to that at the location where the bodies were buried.

The jury found the Petitioner guilty; and in the second stage of the proceeding, the State introduced evidence that Kathy Ann Brown, the horse trainer who had worked for Mrs. Ashmore and who also had been missing, had also been bound, gagged, strangled and buried in the same grave with Mrs. Ashmore on the Petitioner's property. The Petitioner introduced evidence in mitigation, which included a stipulation concerning the Petitioner's alleged heroism in saving a person from a burning truck on an earlier occasion.

The jury returned the verdict imposing the death penalty and found that four aggravating circumstances existed:

> 1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 in money from the family of Kendal Inez Ashmore.
>
> 3. The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge.

The jury specifically found that the aggravating circumstances were not outweighed by any mitigating evidence which had been presented.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

SINCE A PREVIOUS EVIDENTIARY HEARING REVEALED THAT THE NONDISCLOSED REPORTS WOULD NOT HAVE AFFECTED THE OUTCOME OF THE TRIAL, PARTICULARLY IN VIEW OF THE FACT THAT THE PETITIONER'S ATTORNEY PERSONALLY SPOKE TO THE WITNESSES REFERRED TO IN THE REPORTS AND THEREAFTER DECLINED TO CALL THEM AS WITNESSES AT THE EVIDENTIARY HEARING, THE MANDATES OF UNITED STATES V. AGURS HAVE BEEN COMPLIED WITH AND THE PRESENT PETITION FOR WRIT OF CERTIORARI, WHICH PRESENTS ISSUES WHICH HAVE PREVIOUSLY BEEN PRESENTED TO THIS COURT, SHOULD BE DENIED.

This is the third time the Petitioner has filed a Petition for a Writ of Certiorari with this Court with regard to the death sentence imposed upon him by a jury in the District Court of Tulsa County and which has been upheld by the Oklahoma Court of Criminal Appeals on direct appeal and in two separate post-conviction attacks.

In his second Petition for Writ of Certiorari to this Court, Larry Leon Chaney v. Oklahoma, No. 81-6016, the Petitioner made the identical claims concerning the alleged withholding of exculpatory evidence which he is making in his present Petition. After the denial of the Petitioner's second Petition for Writ of Certiorari, this Court issued its opinion in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982). In the present Petition, the Petitioner has carefully couched his argument regarding the alleged withholding of exculpatory evidence in terms of the holding of Enmund in an attempt to have this Court accept certiorari on grounds identical to those upon which certiorari has previously been denied. A review of the "Questions Presented" portion of the previous Petition (attached hereto as Appendix "A") reveals this fact.

The only intervening circumstance has been this Court's decision in Enmund v. Florida, supra, which, for reasons stated in Proposition II, should not affect the validity of the death sentence in the present case.

Enmund v. Florida, supra, did nothing to change this Court's previous decisions regarding exculpatory evidence. The standard announced by this Court in United States v. Agurs, 427 U.S. 97 (1976), still applies. See also, Smith v. Phillips, 455 U.S. 209 (1982).

In United States v. Agurs, supra, this Court held that, when there has been a defense request for specific evidence, the failure to disclose such will mean reversal if nondisclosure "might have affected the outcome of the trial." 427 U.S. at 104. Assuming for the moment that a specific request was made,[1] the State submits that the mandates of Agurs have not been breached.

---

[1] The request made was so expansive (see the Petitioner's Petition, p. 3) it should be considered to be a general request and, therefore, should fall under the third type of nondisclosure enunciated under Agurs, with reversal occurring only if the omitted evidence would create "a reasonable doubt that did not exist." Id., at 109-112.

It is appropriate to conduct an evidentiary hearing to determine whether the principles set forth in Agurs have been violated. Briggs v. Raines, 652 F.2d 862, 865-66 (9th Cir. 1981). In the present case, an evidentiary hearing was conducted by the trial court on May 1, 1981, pursuant to the Petitioner's first Application for Post-Conviction Relief. This hearing was conducted prior to the Petitioner's second Petition for a Writ of Certiorari to this Court.

At this hearing, the Petitioner's attorney called only one witness, the District Attorney, Mr. Fallis, to testify concerning the reports that were not disclosed (P.C. Tr. 5).

At this point it is most significant to note that Mr. Smallwood, the Petitioner's attorney, admitted at the close of the hearing that he had spoken personally with several of the witnesses whose testimony he claims is so important and declined to call any of those persons to testify as to the information they possessed (P.C. Tr. 38).

Furthermore, the District Attorney, Mr. Fallis, explained the lack of significance of the testimony of the witnesses referred to in the nondisclosed reports. As to the witness, Poppy Weaver, who allegedly observed the victim at a time which the Petitioner claims would have been inconsistent with the prosecution's theory of the case (Petition, pp. 4-5), Mr. Fallis testified that, when contacted previously, Ms. Weaver stated that she could not identify this woman as being Mrs. Ashmore, the victim (P.C. Tr. 25). Mr. Smallwood, the Petitioner's attorney, specifically admitted talking to this witness and yet declined to call her to testify at the post-conviction evidentiary hearing (P.C. Tr. 38).

Regarding the second witness, Mr. Hamilton (Petition pp. 5-6), Mr. Fallis explained that the pickup had been discovered thirty minutes prior to Mr. Hamilton's siting and that the person he saw was an employee of the victim's husband (P.C. Tr. 24). Again, it should be noted that Mr. Smallwood also spoke to Mr. Hamilton personally and declined to call him as a witness at the evidentiary hearing (P.C. Tr. 38).

With regard to the third witness, a schoolboy who observed a "red pickup" during the day when the Ashmore pickup was found (Petition p. 6, n. 6), the exculpatory nature of this evidence is not apparent and Mr. Smallwood did not even interview this witness nor subpoena him to appear at the evidentiary heairng (P.C. Tr. 38).

In view of the fact that the Petitioner's attorney interviewed these witnesses, yet declined to call them as witnesses at the evidentiary hearing, it can hardly be claimed that these witnesses possess information which would be useful to the Petitioner if he were granted a new trial.

Furthermore, the trial judge who presided over the jury trial of the Petitioner and who conducted the evidentiary hearing discussed above filed a five-page order in which he applied the principles of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, supra (Order Denying Application for Post-Conviction Relief, July 27, 1981). The court also noted that "the evidence in the trial of this case established one of the strongest cases against a criminal defendant that the Court has witnessed as a trial judge." Id., p. 4. The facts as set forth in the Statement of the Case and the opinion of the Oklahoma Court of Criminal Appeals also support this judgment. See, Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980).

II.

THE HOLDING OF THIS COURT IN ENMUND V. FLORIDA DOES NOT PREVENT THE STATE FROM IMPOSING THE SENTENCE OF DEATH UPON A PARTICIPANT IN A MURDER WHERE, AS EVIDENCED BY THE ACTIONS OF THAT PARTICIPANT, HE, AT THE VERY LEAST, "CONTEMPLATED THAT LIFE WOULD BE TAKEN."

After this Court denied the Petitioner's second Petition for a Writ of Certiorari, it issued its opinion in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982). The State submits, however, that the mandates of Enmund should in no way affect the death sentence which has been imposed in the present case.

In Enmund, the Court set aside a death sentence in a case involving an accomplice who was, at best, 200 yards from the scene of the robbery in which two victims were shot to death by

Enmund's accomplices.[2] There was no showing that Enmund anticipated that anything more than a robbery would take place. This Court held that, under the facts of the case, the punishment was disproportionate to the crime charged and thus violated the Eighth Amendment.

The present case differs greatly from that in Enmund. In Enmund the Court was concerned with a case where "minimal participation" in a capital felony resulted in the death penalty. 51 U.S.L.W. at 5090. The Court reversed the judgment because the Florida Supreme Court "affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." 51 U.S.L.W. at 5092.

In the present case, however, the evidence reveals the Petitioner's deep involvement in the crime from beginning to end. The following facts are indicative of his direct involvement in the abduction and subsequent murder of Mrs. Ashmore and her employee, Kathy Brown:

> (1) The victim's husband, Mr. Ashmore, received a telephone call from a man who stated that he had "got your old lady and that honky that works for you and I want a half a million dollars in one hundred dollar bills" (Tr. 351).
>
> (2) The next day he received a telephone call from a man with the same voice who ordered Mr. Ashmore to take the money to a designated area at a rodeo grounds or his wife "would be killed." This telephone call was traced to the telephone number of the Petitioner's residence, where he was arrested some eight hours later.
>
> (3) Approximately 2½ hours after Mr. Ashmore received the telephone call directing him to the rodeo grounds and threatening the life of his wife, a third

---

[2] Justice White observed that the Florida Supreme Court held that "the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape." 51 U.S.L.W. at 5089.

telephone call was made to Mr. Ashmore by a man with the same voice, which stated that if Mr. Ashmore did not do exactly what he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, motherfucker" (Tr. 373). This call was traced to a pay telephone booth where the Petitioner's palm print was taken from the telephone receiver handle.

(4) When the Petitioner was arrested at his residence, the residence was searched and a piece of paper was found in the trash can. Upon the piece of paper, in the Petitioner's handwriting and upon which appeared the Petitioner's fingerprints, was the Ashmore's telephone number (the number where Mr. Ashmore received the three ransom calls) and the number "9148," which was the Ashmore's street address and the name "Richard Elliott" and "1:00 o'clock, Thursday," which were the person Mrs. Ashmore was to meet and the day and time of the meeting.

(5) When the bodies of Mrs. Ashmore and Kathy Ann Brown were found, it was discovered that they had been bound, gagged and strangled with strips of a towel. The operators of a motel near where the bodies were found testified that the Petitioner had stayed at that motel the night before Mrs. Ashmore was kidnapped and that several towels were missing after he checked out. One of the operators also testified that the room where the Petitioner stayed had a red clay-like mud on the bedspread.

(6) The property where the bodies were uncovered had been rented by the Petitioner several months earlier and he had been building a house thereon.

(7) When the Petitioner was arrested, a pick-ax was found at his residence which was found to have soil particles on it which were similar to the soil at the location where the bodies were buried.

(8) The Petitioner was observed driving in the area near the burial site late in the afternoon of the kidnapping and during the same time period was seen in a nearby convenience store in a dirty condition and with dirt from his knees down.

It is, therefore, readily apparent that the Petitioner, at the very least, "contemplated that life would be taken." Enmund v. Florida, supra, 51 U.S.L.W. at 5092. Furthermore, the fact that it is conceivable that someone else may have been involved in the abduction and murder of Mrs. Ashmore and Kathy Ann Brown does not diminish the "blameworthiness" of the Petitioner. Enmund v. Florida, supra, 51 U.S.L.W. at 5099 (O'Connor, J. dissenting).

The State submits that the facts of this case reveal the Petitioner's direct culpability in a most savage crime. The Court of Criminal Appeals observed that "this case is one of the most heinous and cruel cases considered by this Court." Chaney v. State, supra, 612 P.2d at 283. The Petitioner's argument that the punishment that the State is attempting to impose upon him is "constitutionally excessive" cannot succeed and the State contends that the punishment selected for the Petitioner's involvement is not disproportionate to the crime committed.

III.

SINCE THE TRIAL COURT AND THE OKLAHOMA COURT OF CRIMINAL APPEALS BOTH APPLIED THE PRINCIPLES OF ENMUND V. FLORIDA AND FOUND THAT THE PRESENT CASE WAS FACTUALLY DISTINGUISHABLE FROM THAT IN ENMUND, NO ERROR WAS COMMITTED.

The Petitioner alleges that the district court rejected his Enmund claim because of its "presumption" that "'Enmund is of prospective application only" (Petition, p. 16). However, a review of the district court's order of August 9, 1982 (Petition, Appendix B), reveals that this contention is not accurate.

While the district court did make the comment that it presumed that Enmund was of prospective application (Order, p. 5, n. 4), it "assum[ed], arguendo, that Enmund will at some future date be granted retroactive effect, and thus be made chronologically applicable to these 1977 circumstances" (Order p. 5). The district court then proceeded to devote five pages of its order to a detailed discussion of Enmund and an application of it to the facts of the present case (Order, pp. 5-10).

Therefore, this allegation by the Petitioner has no merit.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

David W. Lee

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION
112 State Capitol Building
Oklahoma City, OK 73105
(405) 525-8550

ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

David W. Lee, of lawful age and being first duly sworn, upon his oath does state:

1. I am a member of the bar of this Court.

2. I served the above and forgoing Respondent's Brief in Opposition to Certiorari on all parties by placing copies in the United States Mail, First Class Mail, postage prepaid, addressed as follows:

Allen M. Smallwood
1310 South Denver Ave.
Tulsa, OK 74119

Jack Greenberg
James M. Nabrit, II
John Charles Boger
10 Columbus Circle
New York, NY 10019

Anthony G. Amsterdam
New York University Law School
40 Washington Square South
New York, NY 10012

3. All parties required to be served have been served.

Further, affiant sayeth not.

David W Lee

DAVID W. LEE

Subscribed and sworn to before me this 27th day of May, 1983.

Martha A.

NOTARY PUBLIC

My Commission Expires:
September 14, 1985

mag

FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6686

A-955

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY LEON CHANEY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE OF THE STATE OF OKLAHOMA TO THE PETITIONER'S APPLICATION FOR A STAY OF EXECUTION OF DEATH WARRANT

TO: Honorable Byron R. White, Justice of the United States and Circuit Justice for the Tenth Circuit Court of Appeals.

The State of Oklahoma, by Michael C. Turpen, Attorney General of the State of Oklahoma, files its Response to the Petitioner Larry Leon Chaney's Application for a Stay of Execution of Death Warrant as follows:

1. The State on this day submits its Brief in Opposition to the Petitioner's Petition for a Writ of Certiorari with this Response and relies on the arguments therein to support its position that the execution date of the Petitioner, which is set for June 24, 1983, should not be delayed further. As is pointed out in its Brief in Opposition, this Court has denied certiorari on two previous occasions in this case and the intervening decision of this Court in Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982), should not affect the death sentence heretofore imposed.

2. The Petitioner claims that the nondisclosure of certain investigative reports violated his constitutional rights. As is noted in the Brief in Opposition, this allegation was raised in the Petitioner's second Petition for Writ of Certiorari and review of this claim was declined. Furthermore, attached to this Response is a copy of transcripts of two hearings which were conducted by the state district court to determine the validity of the allegation (Appendix A and Appendix B). On page 38 of the May 1, 1981, hearing (Appendix A), it is revealed that the Petitioner's attorney,

Mr. Smallwood, personally spoke to the witnesses reflected in the nondisclosed reports and then declined to call them as witnesses at the evidentiary hearing. This fact is discussed on pages 10-11 of the Brief in Opposition.

3. The chronology of legal steps undertaken by the Petitioner is set forth in the Order Affirming Denial of Post-Conviction Relief issued by the Oklahoma Court of Criminal Appeals on February 3, 1983 (Appendix A of the Petitioner's Petition for Writ of Certiorari). The Petitioner's conviction has been upheld three times by the Oklahoma Court of Criminal Appeals. His jury trial was held in September of 1977, almost six years ago.

For the reasons stated in this Response and in the State of Oklahoma's Brief in Opposition to the Petitioner's Petition for Writ of Certiorari, it is respectfully requested that the Application for a Stay of Execution of Death Warrant be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, FEDERAL DIVISION
112 State Capitol Building
Oklahoma City, OK 73105
(405) 525-8550

ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

David W. Lee, of lawful age and being first duly sworn, upon his oath does state:

1. I am a member of the bar of this Court.

2. I served the above and forgoing Respondent's Brief in Opposition to Certiorari on all parties by placing copies in the United States Mail, First Class Mail, postage prepaid, addressed as follows:

Allen M. Smallwood
1310 South Denver Ave.
Tulsa, OK 74119

Jack Greenberg
James M. Nabrit, II
John Charles Boger
10 Columbus Circle
New York, NY 10019

Anthony G. Amsterdam
New York University Law School
40 Washington Square South
New York, NY 10012

3. All parties required to be served have been served.

Further, affiant sayeth not.

David W. Lee

DAVID W. LEE

Subscribed and sworn to before me this 27th day of May, 1983.

Martha A. Ginn

NOTARY PUBLIC

My Commission Expires:
September 14, 1985

mag

Copy

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 30 1981
Ross N. Lillard, Jr.
CLERK

LARRY LEON CHANEY,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PC 81-345

NO. CRF-77-756

RECEIVED
AUG 5 1981
ATTORNEY GENERAL
of Oklahoma

A transcript of the proceedings had and testimony taken in the above-entitled cause on May 1, 1981 before the Honorable Jay D. Dalton, District Judge in and for the County of Tulsa, State of Oklahoma.

APPEARANCES:

ALLEN M. SMALLWOOD, ESQUIRE,
Counsel for Petitioner.

S. M. FALLIS, JR., ESQUIRE,
DISTRICT ATTORNEY,
and RONALD SHAFFER, ESQUIRE,
Chief Prosecutor,
Counsel for Respondent.

DISTRICT COURT
FILED
JUL 1 1981
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA COUNTY

REPORTED BY:

Virginia A. Boone, CSR, RPR-CP,
Official Court Reporter.

APPENDIX "A"

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
S. M. Fallis, Jr.	5	32	33	--

+ + + +

EXHIBITS

PETITIONER'S	DESCRIPTION	ENTERED
A, A-1	Cover Sheets	37
B, B-1, C, C-1, and D, D-1	Statements	37
E	Fire Dept. Document	40

+ + + +

Court Reporter's Certificate	56
Judge's Certificate	57

** ** ** **

P R O C E E D I N G S

THE COURT: For purposes of the record, this is CRF-77-756, Larry Leon Chaney, an application for post-conviction relief. It's Larry Leon Chaney, Petitioner, versus the State of Oklahoma, Respondent. All parties appear to be present.

It is my understanding, and Defense Counsel stated in chambers, he waives his client's presence for the purpose of this hearing. Is that correct?

MR. SMALLWOOD: I do, Your Honor.

THE COURT: Very well. Any witnesses that intend to testify in this case may stand and raise your right hand and be sworn at this time.

MR. SMALLWOOD: The only witness I have subpoenaed is Mr. Fallis.

THE COURT: Do you solemnly swear the testimony you are about to give in this cause now on trial will be the truth, the whole truth and nothing but the truth, so help you God?

MR. FALLIS: I do.

MR. SMALLWOOD: Very briefly, could I make a statement before I call Mr. Fallis, if I could?

THE COURT: Very well.

MR. SMALLWOOD: It's my understanding the Statutes of the State of Oklahoma in a post-conviction relief requires the respondent to respond within thirty days, a written response.

I'm fully aware it has not been thirty days yet.

However, it is set for hearing. If the State of Oklahoma has not filed a response, I move for judgment.

MR. FALLIS: We have a response. To relax any apprehension Mr. Smallwood may have, we ask to file it instanter.

THE COURT: It will be allowed.

MR. SMALLWOOD: I have a right to a copy, Judge, since that is just the original.

THE COURT: Yes, you should be presented a copy.

MR. SMALLWOOD: Could I have an opportunity to read the original?

MR. FALLIS: It is rather brief. I'll get one to him. I thought a copy was with that. I'm sorry.

Your Honor, I'll certainly furnish him a copy.

THE COURT: Very well. As a matter of fact, as soon as he reads it I'll have my bailiff run a copy for him right now, while we're proceeding.

Make sure that is filed today, the response of the State.

Counsel, would you like to give any opening remarks?

MR. SMALLWOOD: Very briefly, Judge.

As we discussed at the first setting of this matter, this application deals with alleged exculpatory evidence which was in the possession of the State of Oklahoma either during the investigatory stage of this case or immediately thereafter prior to the preliminary hearing, I think. Or at any rate, certainly prior to trial. I'm not exactly certain when this evidence was provided the District Attorney's office. That is one of the reasons I'm calling witnesses in this case today.

As Your Honor correctly surmised last time, this deals with what has become a Brady matter, exculpatory evidence the State has in its file which has not been turned over to the Defendant, which evidence is material to the guilt or innocence or punishment.

I think after the conclusion of the hearing today, coupled with the application I've filed, the evidence will establish conclusively that such material, exculpatory evidence, was in the possession of the State of Oklahoma at least prior to trial, if not sooner; that a specific written motion was made for such evidence, in addition to certain oral requests made. The Tulsa County District Attorney's office either had actual knowledge of this exculpatory evidence or, as a result of the case law in the Statutes, to look for that and be aware of that.

Such material of exculpatory evidence was not disclosed to me, which denied Larry Leon Chaney a fair trial and due process of law.

THE COURT: Does the State have any remarks to give at this time?

MR. FALLIS: Your Honor, we have no remarks other than the same position we stated to the Court, I recall, in April of 1977 prior to the date of the trial when, I guess it would be classified as a general Brady-type of request was made by Counsel; that there was nothing existing within the files or within our knowledge indicating any exculpatory material as to the guilt of the accused, and now convicted, Larry Chaney, or any matters that would be exculpatory relating to punishment.

That position was true then and it's true now. The filing of the application by Counsel has not changed that position. We know of nothing exculpatory in this matter.

THE COURT: Very well. The Petitioner may call his first witness.

MR. SMALLWOOD: We'll call S. M. Fallis, Jr., the Tulsa County District Attorney.

THE COURT: Mr. Fallis has been sworn to testify.

S. M. FALLIS, JR.,

called as a witness on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMALLWOOD:

Q Sir, will you state your name and occupation?

A S. M. Fallis, District Attorney, District 14, Tulsa County, Oklahoma.

Q And you are employed as the Tulsa County District Attorney and have been employed in that office for approximately how long, sir?

A I've been in the office since June, 1960, the District

Attorney since January, 1967.

Q Will you state for the record, sir, what your authority is as the elected Tulsa County District Attorney?

A My duties and responsibilities and authority is set out in Title 19, which is to file and present charges to prosecute those charges through the various courts. In addition to that, we have responsibilities in civil areas to represent our local public officials within the county courthouse. There are other specifics, but, basically, that is it.

Q Does your responsibilities include filing criminal charges for violating the State Statutes?

A That is true under State Statute.

Q Is there any state office in Tulsa County, Mr. Fallis, other than yours who has any authority or responsibility to file criminal charges for violating the State Statutes?

A The assistants who work for me in an alter ego position have the same authority I do. That is only because the Statutes -- The office itself is the only one within District No. 14, Tulsa County, that would have that authority.

Q No other officer precedes your authority in this regard; is that correct?

A Other than the Attorney General's authority to file outer action under the particular section of the Statutes throughout the state.

Q Calling your attention to March 17, 1977, did you become personally associated with, at the time, kidnapping, later murder charges, which related in the filing of the State of Oklahoma versus Larry Leon Chaney, CRF-77-756?

A I did.

Q Could you describe for the Court, please, sir, your role in this investigation prior to the murder charge being filed, but not in detail?

A I was first notified that there had been a kidnapping and extortion calls made to the home of Phillip Ashmore. I believe I was told somewhere around ten o'clock or eleven o'clock in the morning on the 18th of March, 1977.

Once I was advised of this I dispatched my chief investigavor to communicate with the local Federal Bureau of Investigation to see if this was a matter that might involve their area of responsibility.

Sometime later that same date - I could be a day off, but I believe that was the date - I did personally talk with Mr. Dale Williams who was the acting sergeant in charge of the local office of the FBI.

I again communicated with him by phone later that day, and it was sometime near the hour of midnight, a little before midnight, on the 18th, I believe, that I actually become involved in the sense of going to the office of the FBI. At that point, in a sense, I guess, took charge of trying to coordinate the efforts of the bureau, the District Attorney's office, the Sheriff's office, the OSBI, the Highway Patrol and the Tulsa Police Department. That continued until the date the charges were filed and subsequent to that.

Q Is it a fair statement to say, Mr. Fallis, since you were in charge of coordinating the various law enforcement agencies and ultimately were the actual prosecutor, trial lawyer, for the State of Oklahoma in this case, that there is no one else in the Tulsa County District Attorney's office who has any greater knowledge or more superior knowledge than you as far as the details of the investigation of this case is concerned? Would that be a fair statement?

A I would say Mr. Shaffer probably has equal knowledge that I do because he worked beside me throughout this matter. My investigators worked beside me throughout the matter also, so in that sense they probably have equal knowledge to what I would have. It would be equal, I'm sure.

Q Would it be fair to say no one has any more knowledge or superior knowledge to the details of this case, greater knowledge?

A I stated the people I mentioned could. I guess with that amendment I agree with your statement.

Q Your response to one of my questions there was that there were many law enforcement agencies involved. Would it be a fair statement to say that the Tulsa County Sheriff's office, the Tulsa County District Attorney's office, the Tulsa Police

Department, the Oklahoma Highway Patrol and the Tulsa division or unit of the Federal Bureau of Investigation all worked conjointly in the investigation of this case to some degree or another?

A Yes, sir, I think that would be fair.

Q Is it not a policy of your office, as well as of the offic of various other agencies you and I have mentioned, to share any and all information you receive regarding a case of this magnitude, or of this seriousness?

A As a matter of policy that would be my policy. I cannot speak for the other agencies. There have been instances and times when we did not share knowledge, but I'm not aware of that in this case.

Q At any rate, your testimony would be you did not impede any share of knowledge among the agencies?

A Most certainly not.

Q Are you aware of anyone else from any agency that might have done so, impeded or prevented the flow of knowledge from the various agencies, or between the various agencies?

A No, sir.

Q Mr. Fallis, have you been with the Federal Bureau of Investigation?

A Oh, no, sir.

Q You worked with the members of the Federal Bureau of Investigation, certainly, since you've been the Tulsa County

District Attorney, have you not?

A Yes, sir.

Q Could you describe to the extent you have knowledge what the procedure is for the Federal Bureau of Investigation as far as gathering investigative reports and turning over those reports to agencies for prosecution in the U.S. Attorney's office?

A I do not know their procedure, Mr. Smallwood. I can only relate to this case. If we restrict it to this case, there were reports submitted from that agency based upon the work they had allegedly done. As far as their policy or how they do that, I have no knowledge.

Q You have no knowledge that any evidence that they might have gained as a result of an investigation was not turned over to you as of this date?

A I have no knowledge of that in the term of evidence. Yes, I have no knowledge of that.

Q Can you recall just from your memory approximately how many FBI reports you personally saw in the particular case we're dealing with here, or estimate as to the volume or amount of material that was turned over to you by the Federal Bureau of Investigation from the time of the investigation, that it began, until trial?

A Written material, I would say probably - I'm just estimating - thirty-five pages, maybe. Something like that.

Q Would that have dealt solely with investigative reports of various agencies?

A To my recollection, yes.

Q Do you know what the policy is of the FBI, or what your policy is, regarding investigation of this nature as far as reducing statements of witnesses to writing? Is there any kind of criteria that you go by?

A I don't know the policy of the FBI, if they have one. So far as our office is concerned, if we have contact with a party who seems to have information that might be of value, normally, we'll try to take a statement.

Q And those statements are reduced to writing?

A Sometimes.

Q Has it happened in your tenure as District Attorney, Mr. Fallis, that statements have been made by witnesses that might put you on notice that information might be valuable to you, that that information be reduced to writing and later the witness changes his or her mind and decides a mistake has been made?

A That has happened, yes.

Q In effect, recanted what they had already stated?

A I never had a witness totally recant it, with one exception, in the trial of the State versus Jesse Weaver where Polly Weaver, his wife, got on the witness stand after communication with Counsel, apparently, and recanted her story she had given.

But as a practical matter in just general terms, it would not be unusual for a witness to say to me that "the statement I gave, I was off an hour on my time estimate. I thought it over, and I was off." Little details, but not totally recanting. I can't recall any one specific other than the Jesse Weaver case.

Q Statements reduced to writing, you would consider them to be an important statement to your case, and if a change was made in that statement would it be your policy to reduce that change or amendment of that witness' statement to writing?

A Not as a matter of policy. I might have them amend it. As an example, if we have a transcript of the court proceedings, I have them read that and I'll say, "If you find an error, mark it." If they have given a statement, I have them look at it and if they find an error I have them mark that. As far as taking another statement because of that, no, not necessarily.

Q Mr. Fallis, I want to hand you what has been marked for purposes of identification as Defendant's Exhibits A through D-1, consisting of eight pieces of paper stapled together, two-page reports a piece, and they purport to be FBI reports. I'll ask you if you have ever seen those before, sir.

I would ask in your answer, Mr. Fallis, to refer to the report by the exhibit number for the record.

A The very first exhibit, Defendant/Petitioner's A, quite frankly I have no recollection of having seen what would appear to me to be some type of cover page for an FBI report.

As far as B, C and D, Yes, I've seen those before.

Q Would that include D-1 and D-1 also, sir, the second pages to those?

A Yes.

Q In reference to exhibit A and A-1, as you stated, it purports to be a cover page for the compilation of reports from the FBI, and you stated you have no knowledge of having seen this specific report?

A No, I have no recollection. It may well be within the reports. It doesn't have any information that would be of any value on it.

Q Would it be a fair statement to make, Mr. Fallis, that you have seen cover pages like this before from the Federal Bureau of Investigation? Is this a standard format that is used, or do you know?

A I don't know.

Q This has various dates on it, Mr. Fallis, and at the very top there is a typed date of 4/5/77, a stamped date at the lower right of 4/11/77, lower of April 28, '77. Could you enlighten the Court and me as to what those typed dates or stamped dates might indicate, based upon your experience or these reports, or reports like these?

A I didn't prepare the report, I have no idea what they mean, other than I would be guessing, Mr. Smallwood, as to the top. I assume that 4/5/77 is the date their cover page was prepared.

That is an assumption. I have no idea.

As far as the stamped date on the bottom, it looks like it has been stamped like a set stamp of some kind. It is not one I utilitize. I don't know whether it is one that someone else utilized. Maybe it is a date where someone received it, a clock-in stamp of some kind.

Q Referring to Exhibit A-1, it appears to be a typed statement by the then U.S. Attorney, Nathan G. Graham, indicating a copy of the report was being furnished to you as a aid to you in the charges of kidnapping and murder. Understanding you have no personal recollection of this particular coverage, would it be a fair statement to make, Mr. Fallis, if Mr. Graham was in fact doing as that statement indicates, you would have had this cover page in your possession prior to the preliminary hearing? Would that not be a fair statement?

A If it was included in the reports they gave, yes. I don't recall the date of the filing, but the incident where Mrs. Ashmore and Kathy Brown were missing began March 17th. It seems to me like charges were filed sometime around the 22nd, 21st, 23rd, something like that. I could be in error. I'm just shooting from memory.

If that were true, this happened March 17, 1977, yet this report wasn't made until April 5 of '77, or received by somebody on April 5th of '77, and then stamped April 11, '77 and again received April 28, '77. The only thing I could conclude, apparently this was prepared after I filed charges. If I'm correct, charges were filed sometime around the 21st, 22nd of March.

Q Referring to exhibit B and B-1, C and C-1, D and D-1, you stated, for the record, you have seen those, or originals or copies, of that exhibit before. Will you state for the record what those are, sir?

A Yes. These are reports, copies of reports, that were made by, apparently, agents of the FBI concerning evidence in the investigation of the kidnapping, extortion and murder of Mrs. Ashmore and Kathy Brown.

Q Mr. Fallis, your office apprised me of names of individuals making the reports in the exhibits, but the exhibits I handed you and you have in your hand, someone has X-ed out or blocked out the names of the individuals making the statement, as well as any reference to the particular FBI agent that was gathering the information. Can you tell me now the names of the FBI agents that took the statements of any of those witnesses, from memory? If not, can you get that information for me?

A From memory, I'm trying to recall. Perhaps it should be understood, Mr. Smallwood, if I could give some description of the way this investigation was conducted it might answer some of your questions that you have.

Q Certainly, certainly.

A As we were hoping to find and locate these ladies, and hopefully they were not deceased, the representatives of the FBI and primarily each of the agencies I've mentioned would meet continually. We met continually in my office over this period of time, and as matters would come to our attention - As an example, through phone calls, through contacts - various people would be dispatched.

I recall Mr. Brewster of the FBI was the man who was physically present, although I'm going to have to assume he dispatched other people to do work that I requested of them. "Could you check this out, could you check that out," and so on.

Any time you have the type of investigation where you have various agencies, I personally have no recollection of who would have been the person actually doing it. I'm looking at Exhibit B and B-1.

Q That would be Defendant's?

A Yes. My recollection would be this involves an interview of a person by the name of Hamilton. I do not have a recollection as to the agent who allegedly would have made the interview. I do recall, however, that a Tulsa police officer by the name of Tom Nolan also interviewed Hamilton.

With reference to Defendant/Petitioner's Exhibit C and C-1 I do not recall the name of the boy that saw a red truck near 91st and Memorial, and I have no recollection right now as to who might have received that information.

Concerning Petitioner's D and D-1, relating to a lady, her name was furnished to you. Again in this instance, I have no recollection. I might be able to find out, but I have no recollection of it.

Q Regarding Defendant's B through D-1, can you state for the record, Mr. Fallis, to the best of your memory when those reports came in your possession and when you became aware of the information contained therein?

A Okay. I again am operating on an assumption, and I think it is fairly accurately.

The lower left hand corner of the first page, Defendant's B which is attached to B-1, there is "Interviewed on 3/18/77," March 18th, 1977. I think it would be fair and accurate, and I would assume, I was apprised of that somewhere near that date when that interview took place, because it is necessary when you are in the investigation to evaluate the information that is being received, and that was done in this case.

With reference to Defendant's C and C-1, I do not see a date on this as to a date of interview -- excuse me, there is one date alluded to. There is a date of March 21, 1977, and I would say I must have been apprised of that on or near that particular time, again, as part of the investigation or within the confines of the investigation.

As to D and D-1, the interview date shows March 22nd of '77, so I would assume either on that date or sometime shortly after that date I would have been apprised of that, again, within the setting or confines of the structure of the investigation.

Q Mr. Fallis, do you have any personal recollection of actually either reading these reports or hearing an FBI agent orally tell you what these witnesses said, and if so could you put a date to that?

A I'm sure I've read these reports not once but several times, and I have no way to put a date on that. I am confident they were discussed also. Again, I have no date I can utilize other than utilize the interview date because as these matters were being done they would be relayed back to what was then being called - I think by the news people rather than by law enforcement - the command center, and utilized for any investigative leads they might have.

MR. SMALLWOOD: If the Court please, for the record, one of the witnesses, Mr. Pregler, has entered the courtroom. I have no objection to him being in here, but if the State wishes to exclude him they can. He is here to testify to business records from the Jenks Fire Department.

THE COURT: He may remain, if there is no objection.

MR. SMALLWOOD: Thank you, Your Honor.

BY MR. SMALLWOOD:

Q Mr. Fallis, were you aware of any statements whether made orally to investigative officers or possibly reduced to writing which could be construed as a recantation or a denial of any of the information contained in Exhibits B, B-1, -- D-1 prior to September, 1977?

A No, -- You mean by the author?

Q By the witness.

A No, I'm not aware of that.

Q Mr. Fallis, you lecture nation wide, it is my understanding, as an expert or a well known lecturer on criminal law and your duties of District Attorney and prosecutor are in areas regarding this, do you not, sir?

A I'm not sure I understand your question.

Q Bad question, maybe. Are you not a teacher or lecturer?

A Maybe I can clear it up. I didn't know if you mean talking in terms of reports or something like that.

Q Generally speaking.

A Generally speaking, the matters I have been asked to speak on would deal with trial techniques, matters involving adversary hearings in the courtrooms, not on report preparation.

Q How long have you been a teacher or lecturer in this capacity, sir?

A I'm thinking five, six years, something like that.

Q Can you give an estimate for the record how many teaching seminars or lectures you give annually?

A This year - I'll say the last twelve months - I think three, four, something like that, within the last twelve months. Some years there would be none, some years, perhaps, more than that. Again, it depended upon when the College of District Attorneys would call on me. There would probably be four seminar-like affairs average, I would say, on a yearly basis.

Q Can you say how many states, other than Oklahoma, you have given these seminars?

A In excess of twenty.

Q You are aware, sir, of the prosecutors' obligations or duties regarding what has become known as Brady material, referring to the case of Brady v. Maryland, are you not, sir?

A Yes.

Q Could you briefly state into the record what your understanding of that obligation is?

A My understanding under that particular statement of case law, the prosecutor is obligated to make known to the defense any exculpatory materials, which, basically, is any material that would tend to negate or be indicative of an accused, or mitigate, perhaps -- having some mitigation toward punishment.

I can't recall the year of the case, but it was in mid or early 1960s that that particular matter was decided. It has been the continuing law since then.

There seems to be some debate that the prosecutor responding to specific requests as opposed to the Brady motion. I might say, our policy has been to assume that obligation whether a request was made or not.

Q A written request was made by me, filed in this case in which it went to general material and certain specific material, did it not?

A You filed a request and followed it up later with an amended request.

Q Did you peruse your file, or direct that be done, to see if any exculpatory evidence might exist?

A I did, sir.

Q I take it, you came to the conclusion that none was there or given to me other than what was given to me as required by law? None existed?

A I found nothing other than the exculpatory materials you were given that you specifically asked for, which was allowed by law, the medical records, the scientific records, which you certainly were entitled to.

I did not see anything exculpatory, nor have I discovered anything since.

Q Have you ever lectured or taught, sir, at any of these seminars regarding prosecutor duties under the Brady concept? Has that ever been a subject of your teaching?

A No, sir. It has been alluded to. I may have mentioned it, but it has not been a subject.

Q Do you recall, sir, a conference in your office in which you and Mr. Shaffer and myself were present wherein I asked you if you had any knowledge or any information regarding any I.D. witnesses that would place Larry Chaney with either of the victims in this case, or these cases, or the truck of the Ashmores at any time? Do you remember me asking you that question?

A I can't recall, it may have been. I do not recall it specifically. If it occurred -- I assume from your question you are taking the position that it occurred?

Q Yes, sir.

A I'm not aware of anybody we had that put Larry Chaney, nor am I today, with Mrs. Ashmore that was presented during the course of the trial, or with the Ashmore pickup truck, or any of the materials you have alluded to. If it occurred, my answer would be the same today as it would have been during our conversation, I assume.

Q Do you also recall if you had any eyewitness testimony that would put these women with anyone else or any place that would tend to negate his guilt or mitigate his punishment?

A I don't recall that. If we did, my answer would be that I did not.

Q If I asked those questions, your answers would have been no to both of them?

A Yes, sir.

MR. SMALLWOOD: May I have just a second, Your Honor?

THE COURT: Very well.

BY MR. SMALLWOOD:

Q Mr. Fallis, I'll ask you, could you state for the record why you feel the material contained in Defendant/Petitioner's Exhibits B through D-1 is not exculpatory?

A Okay. Starting with Petitioner's Exhibit B, and I'm going to exclude A and A-1 because it does not contain specific material. Beginning with Defendant/Patitioner's B and B-1, which I recall to be the report referring to Mr. Hamilton who said that he, on the date, according to this report - I believe it was the 18th of March, 1977 - observed a pickup truck. And the manner in which the report is written, it would seem to indicate that -- I'll read the words because I think this is important here, "advised at approximately 7:30 A.M. he went outside of his residence, which is located about one-quarter mile from the above intersection, and fed his stock. He stated he then drove up to the rent pasture, and as he turned into the gate he noticed a man leaving a pickup truck and entering a car which was parked on the other side of the produce building... stated this occurred between eight o'clock and 8:30 and was positive on the time."

Then he later states it was the same truck that was parked there at the present time in the same location. As I go back in memory, and did at the time, it would certainly have been the Ashmore pickup, which was in fact found abandoned at 91st and Memorial.

That particular report, on the surface, may appear to be something of value to either the prosecutor or anybody, if you ignore other reports. But the truth of the fact is, the truck had been discovered parked there thirty minutes to an hour prior to the time Mr. Hamilton even saw it, based on the testimony of an employee of Mr. Ashmore, at least a private contractor who was working for Mr. Ashmore, which was long before that man who said he was positive of the time. So there swould be no relationship of his observation, other than the fact he may have seen Mr. Garby (phonic) get out of his car and look at the pickup, and then drove to Mr. Ashmore's home to alert him to look on 91st.

You have to look at the report in any investigation in relationship to the overall picture. YOu can't just pick out a piece and say, "This is good, bad or indifferent." That relates to Exhibit B and I find nothing in that. When I considered that coupled with the totality of the evidence in this case that indicated nothing in the way of exculpatory information.

Concerning Petitioner/Defendant's C and C-1, a two-page report of some youngster in the Jenks Public School, who, according to the report, around four or 4:30 P.M. on the date of the 17th of March noticed a new looking red pickup truck with a white stripe across it, and he said he noticed it because it was shiny red and he observed a clip-on type CB antenna. He later saw it sometime around 5:30 P.M. when he was going to soccer practice.

Later in the same report, on March 21st by telephone an agent unknown to me, apparently, contacted the school bus driver, who confirmed that the school bus this youngster was supposed to have been on did in fact make turns at the intersection of 91st and Memorial.

It might be interesting that there was a red pickup truck at 91st and Memorial, but Mr. Ashmore's is blue, a blue and white pickup truck, and has totally no relationship to the case.

Also, again looking at the entire record and testimony of the agents, the Ashmore truck had to have arrived at the scene of 91st and Memorial subsequent to the - We'll say to the time or during the time - of the rain storm, based on scientific evidence that was produced at the trial. Again, that had nothing inculpatory or exculpatory. From the prosecutor's standpoint it would tend to be exactly what my thoughts are now, probably Larry Chaney or an associate drove it there at that time.

Petitioner's D and D-1 concerning Poppy Weaver - I think that's what you told me her name was - it is my recollection, she could not with certainty identify this person as being Mrs. Ashmore. As a precaution, based upon having received your notification in this case, she was talked to again by an investigator from my office. Her response was, "I couldn't identify the woman now, I can't identify her now." So, again, I find nothing in those reports that is exculpatory.

Q Has it been your experience, Mr. Fallis, FBI agents in accumulating reports conduct themselves in such a way as to make those reports as accurate a compilation or accurate reproduction of oral statements they have been given by the witness as they possibly can make?

A Well, my experience, I would say I'm sure all people try to do that. I don't know, I have no way of knowing how accurate they are from time to time. That is why, again, you have to look at them in view of the totality of the evidence to see. As an example, if I had a report that said Mrs. Ashmore was seen on March 30, 1977 walking down the street in Sallisaw, Oklahoma, then I would say, "Gee, based on the fact that she was found in a grave prior to that time, then that person must be in error.

That is the same process you go through as you look at reports. You realize there are reports that, you know, cannot be accurate, even though a person may think she sees something.

Even in these reports, even if what they said was correct or true, which I don't; No. 1, I don't think the red pickup truck in any way, under the examination, had any relationship with the case. Mr. Hamilton, he is probably a very fine man, but in error if he thought the truck was being driven up by Mr. Garby, well, Mr. Garby had already discovered the truck. He didn't drive it.

The lady, Poppy Weaver, she, by her own statement to us and by discussions within the office, was not sure. I'm satisfied it was the lack of her ability to be sure that it was reliable or admissible evidence, and we have to deal with what we would have for admissible evidence.

Q Mr. Fallis, I asked you a prior question regarding the recantation or denial of any statements contained in Defendant/Petitioner's Exhibits. Ms. Poppy Weaver's statement contained in D and D-1 indicated she wasn't certain when she was in your office. Was that just recently?

A No, I didn't say she said she wasn't certain. I'm saying during the discussion with the agent, trying to decide which move to make and where to look and so on, it was during that time it would have been normal that we look at that and say, okay, to evaluate, to find out, "Does this person know?"

Within the time subsequent to receipt of your application for post-conviction relief, I assigned an investigator to talk to her again. I think this was after the time you had been furnished the name by Mr. Shaffer.

Q I think it was prior.

A Whatever the date was. In any event, I'm relating as far as what she said to me at that time, which recalls to my memory the evaluation that would have been made back then, and that is that the lady was trying to be helpful, but apparently couldn't be.

Q The fact is, the only written evidence in your files of the statement of Poppy Weaver, Exhibit D and D-1, that is the only written one?

A The only written one, yes, sir.

Q You stated, Mr. Fallis, in answer to one of my questions that Mr. Chaney and his associate did something.

A I said, in my mind I could assume that. Again, I was making reference to how the truck got there that was ultimately recovored at 91st and Memorial. I'm sure it didn't materialize.

Q Are you stating, for the record, it is your opinion that Mr. Chaney had a confederate?

A No, sir. I'm saying I have no evidence as to whom put the truck there. That's the point I was trying to make. Whether he did or not, I don't know.

Q Isn't it a fact, Mr. Fallis, no one knows exactly, or no one testified at the trial of this matter -knows exactly when Kendall Ashmore and Kathy Brown was kidnapped, the exact time of the day?

A No one that testified, no, sir.

Q Isn't it a fact that no one that testified on your investigative team knows the exact time of death of both Mrs. Ashmore and Miss Brown?

A Well, the only way I can answer that, Mr. Smallwood, would be within the perimeter as established by Dr. Hoffman in his testimony. That would be the --

Q As an exact time, nobody can testify to that?

A Somebody can testify to that.

Q Obviously, the person that killed them could.

A I think he could, yes.

Q In fact, wasn't the time of death a very hotly contested issue?

A Well, one of your witnesses, a doctor in a Texas hospital whose name escapes me --

Q Dr. White.

A Dr. White, I think was the witness that you presented adverse to Dr. Hoffman's concerning the time of death.

His testimony, I think, could be described as an effort to impeach Dr. Hoffman's conclusion as to the time of death, and the State presented rebuttal by Dr. Fogel who reaffirmed Dr. Hoffman. It was as a whole contested, but, yes, it was an issue.

Q Your theory as to the time of death was crucial to your success and the maximum sentence in this case, in your opinion?

A No, sir.

Q It was not crucial?

A No, sir. What was crucial, Mr. Smallwood, was that the jury found beyond a reasonable doubt that Larry Chaney was involved in the kidnapping and death of Kendall Ashmore.

Q As I recall, Mr. Fallis, the State of Oklahoma presented no eyewitness testimony that placed Mr. Chaney with either of the victims in this case, or on the Ashmore property, or in the vicinity of the Ashmore truck; is that a fair statement? at any time.

A That no witness put Larry Chaney with them?

Q Yes.

A I'm not aware of any witness.

Q If you had a witness that could testify that could have placed Larry Chaney in the vicinity or company of Kathy Brown or Kendall Ashmore, or in the vicinity of the Ashmore truck on March 17, 1977, would you have presented it to the jury?

A Yes, sir.

Q Why would you have done that?

A I think it is very material from the standpoint that if you have reliable evidence of putting them together it would have been material.

Q Would it be, in your opinion, material to the defense if the defense could have presented an eyewitness that could have placed, say, another male individual in the company of Kathy Brown and Kendall Ashmore during the same time frame? Could it have been?

MR. SHAFFER: Judge, we object to what it would or could have been. We could go on all day with what could have been or would have been. If they had a bird dog maybe they could fly.

THE COURT: Sustained.

MR. SMALLWOOD: If the Court please, if I could, Judge —

THE COURT: It's outside the scope of evidence presented so far.

MR. SMALLWOOD: Well, maybe the phraseology, but in U. S. v. Agurs it deals with whether or not that could have been exculpatory or could have affected the outcome of the trial. That is why I phrased --

MR. SHAFFER: It's assuming a set of facts not in evidence.

THE COURT: Sustained. I have the Agurs case here, and I've read over it with a fine tooth comb --

MR. SMALLWOOD: If the Court please, if you sustain that I'm going to make an offer of proof that if Mr. Fallis could testify he would testify that if the defense could have placed another individual, say another male, in the presence of either Kathy Brown or Kendall Ashmore, or the Ashmore truck during the crucial time periods on March 17, 1977 that would have been very beneficial to the defense, both as to the determination on guilt or innocence and mitigation of punishment, and would have harmed or damaged his case.

MR. SHAFFER: We object to the offer. I don't know where he is getting all this.

THE COURT: Sustained.

MR. SMALLWOOD: Very well, Judge, the record is clear on that. I believe that's all I have.

THE COURT: Does the State wish to inquire?

MR. SHAFFER: Yes, Judge.

CROSS EXAMINATION

BY MR. SHAFFER:

Q Mr. Fallis, do any of these reports indicate who that person was, assuming this woman could positively identify Mrs. Ashmore - who that person might have been in the truck?

A No, sir.

Q Did she ever indicate it was Larry Chaney?

A No, sir.

Q Or that she could even identify any of the people she thought she saw in the truck or around the truck?

A No, sir. As a matter of fact, I think the one report, as I read it a moment ago, seems to negate that.

Q Do any of the reports indicate in any manner that Larry Chaney did not kill Mrs. Ashmore?

A No, sir.

Q Is there anything in there that says anyone other than Larry Chaney killed Mrs. Ashmore?

A I'll answer that question by stating, from the time we became - By we, I mean myself - involved in this matter to this date as I sit here, I have not seen any piece of evidence that is contradictory or contests the guilt of Larry Chaney. If so, I would advise the Court and advise Counsel.

Q As far as how the FBI presents their reports, did you often get reports from the FBI?

A Not very often.

Q These matters that he's talking about, these three different people were checked out back during the course of the investigation and also later after Mr. Smallwood filed his post-conviction appeal; is that correct?

A That is correct, sir.

MR. SHAFFER: Judge, I believe that's all.

MR. SMALLWOOD: Very briefly, if I could, Judge.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. SMALLWOOD:

Q Mr. Fallis, you testified these people who gave the reports were checked out during the course of the investigation, and you still stand with your answers to my questions. However, you have yet to receive any recantations or denials that would countermand the statements contained in these written reports, which are exhibits before the Court.

A With the exception of Poppy Weaver, there is no recantations. I think it was rearnament as to what was determined by matters outside the statements. As an example, if during the course of the investigation of any kind, particularly this investigation, if the investigator came to me and said, as an example, "Allen Smallwood has information that he thinks might be helpful on the matter," and they bring me a statement of yours, and I'd say, "We better check that out." Somebody comes back to talk to you and in talking to you it really is not relevant, the report would remain but it would be set aside because it would not be valuable.

In this case, with the exception of Polly Weaver, there was no recantation. She recanted after you filed for post-conviction relief.

In my memory - I think that is exactly why it was not considered to be valuable information to us or anybody—she couldn't identify them. That certainly was not recanting.

As far as the little boy, we didn't make any additional contact to the little boy then, to my knowledge, or now. It is of no value that somebody saw a red truck on that particular date. I don't know what that would have to do with the matter for a lot of reasons; 1, it is a different colored truck and the little boy, according to the little boy, was sure of the coloring and that the red truck was at 91st and Memorial during that period of time.

It was generally discussed during voir dire and jury selection that that is used many times for a parking place for people who might want to pool their automobile and drive to various areas.

As far as Mr. Hamilton is concerned, he was contacted again for two reasons. Mr. Nolan with the police department talked to him. It would have been extremely important to the prosecution if the man could identify the man bringing the truck up there.

We determined then, and I'm satisfied now, that he in fact saw the truck when the gentleman I mentioned earlier - His name escapes me right now - in any event, was examining the truck, or at least looking at the truck prior to alerting Mr. Ashmore. The time is wrong and totally off.

Secondly, with Mr. Hamilton, Mr. Nolan noticed he was a man of extreme age and had great questions concerning his ability to relate past experiences.

Q These decisions were all made by you in evaluating the weight of the evidence af far as being beneficial to the prosecution?

A No, sir, made by myself in conference with other people. But, Mr. Smallwood, I say this with no sense of trying to sound, or being, impudent to the Court or to you, it doesn't take you or your application to remind me of my obligations ethically. I was fully conscious of them at that time, and I am now.

In consideration of those matters, if I found things that meant Larry Chaney was not guilty I would be the first to come forward, and you should be quite aware of that in your dealings with me and this Court, and quite certainly if it happens, if anything ever came forward it would be known by the Court and by you.

Q Would it be a fair statement to make, Mr. Fallis, that you in your profession and in your job as the Tulsa County District Attorney are not or would not be the most objective person to make that determination as to whether evidence is exculpatory or not in a case of this nature?

A Well, I don't know, Mr. Smallwood, I try to be objective. There are a lot of cases we don't file even if we think the people are guilty because we don't rely on questionable evidence. There are cases we dismiss because we entertain reasonable doubt, cases we have not proceeded with.

As a matter of fact, you mentioned my lectures. One of the basic rules I advise prosecutors in the states where I've appeared, if you have, based on the law and the evidence, any doubts, not just reasonable doubt but any doubts, you should not proceed with the case.

Q My question, Mr. Fallis, would it not be a fair statement that you would not be the most objective, while in the heat of the investigation or heat of the prosecution of a case?

A I guess you're asking for a subjective answer concerning the question about objectivity. My answer --

Q That's right.

A My answer would be, more objective than defense lawyers. There concern is onefold, to protect the rights of their clients. They have an obligation to look, search and find exculpatory evidence. We have a duel concern, to not only search out inculpatory but also to search out that which may be exculpatory.

Q Would it not also be a fair statement to make, one individual might consider information is not exculpatory and a judge might consider the evidence to be exculpatory, or lead to exculpatory? Isn't that possible?

A I'm sure there are difference of opinions on most things, yes, sir.

MR. SMALLWOOD: That's all I have.

THE COURT: Any further questions?

MR. SHAFFER: I don't have anything.

MR. SMALLWOOD: If the Court please, I move to enter in evidence Exhibits A, A-1, B, B-1, C, C-1 and D, and D-1.

THE COURT: Any objections?

MR. SHAFFER: No objections.

THE COURT: They will be allowed in evidence. They will be filed in the case.

(Said documents so marked and filed as Defendant/ Petitioner's Exhibits A, A-1, B, B-1, C, C-1, D and D-1.)

THE COURT: For purposes of the record, I want to ask Mr. Smallwood — Mr. Smallwood, you have been supplied with the names of all these individuals, have you not?

MR. SMALLWOOD: I have been supplied with all the names of the individuals making the statements. I have not been supplied with the names of the FBI agents conducting the interviews and taking the statements. I would like, though, if I could have them.

THE COURT: I assume you have talked with the individuals that you were supplied the names of. Have you had the opportuity to talk to any of them?

MR. SMALLWOOD: Yes, I have.

THE COURT: Could you tell me which ones you've talked to?

MR. SMALLWOOD: I've talked to Mr. Hamilton and I talked to Poppy Weaver at her place of business, and I talked to Mrs. West. I did not talk to Coil. (phonic)

THE COURT: And you haven't called any of those as witnesses here today; is that correct?

MR. SMALLWOOD: I have not.

THE COURT: Is there anything further, anything additional?

MR. SMALLWOOD: There is Mr. Pregler.

(A brief discussion was had off record.)

MR. SMALLWOOD: At this time petitioner and respondent are going to enter into a stipulation regarding Mr. Pregler, P-r-e-g-l-e-r, whose occupation is appointed fire chief of the City of Jenks; that if he were called as a witness he would identify Exhibit E and would state that that is a copy of a Jenks Fire Department Fire Incident Report, which is held in the normal course of business for the Jenks Fire Department.

He would further testify that the report indicates that a fire alarm was made at 4:08 p.m. on March 17, 1977 in Jenks, Oklahoma at the Jenks Fire Station, of which there is only one, and a response was made by the Jenks Fire Department, and that the response was made, or that the fire engineers arrived at the place of the fire at 4:11 p.m., March 17, 1977.

Mr. Pregler would further testify although he has no personal knowledge the exact route the fire trucks took; that in his opinion the most direct and logical route would be to go down Main Street in an easterly direction, which would have taken the fire trucks past the Wells' Grocery Store where Ms. Poppy Weaver indicates in her statement, Exhibit D and D-1, she saw Kendall Ashmore, and Ms. Weaver further indicates in the report she is certain of the day and the time because in addition to picking up her child at school at four o'clock and driving immediately to the store, the fire trucks went by and, I believe, two police cars went by at 4:10 p.m., March 17, 1977.

MR. FALLIS: Your Honor, we can enter into the stipulation. The manner of the wording creates a little problem for me insofar as Counsel's statement of Ms. Poppy Weaver identifying Kendall Ashmore. I think that is in issue here, insofar as reference to her statement --

MR. SMALLWOOD: Reference to her statement?

MR. FALLIS: It is related to her statement.

MR. SMALLWOOD: All right, whatever is contained in Exhibit D and D-1.

THE COURT: Very well, the stipulation will become part of the evidence at this time.

MR. FALLIS: Your Honor, I might make it as clear as we can. With reference to the stipulation that Counsel, I assume was relating it to, the statement that is, or the reports that are, marked and introduced as Defendant's or Petitioner's Exhibit D and D-1 --

MR. SMALLWOOD: The purported statement of Poppy Weaver.

MR. FALLIS: That is correct, her reference to that in her statement?

MR. SMALLWOOD: I would like to have this marked as Exhibit E, if I could, and ask it be admitted into evidence.

THE COURT: Very well, it will be allowed in evidence at this time. It has been marked.

(Said document so marked and filed as Defendant/ Petitioner's Exhibit E.)

THE COURT: Does Counsel for the petitioner have any additional evidence?

MR. SMALLWOOD: I do not, Your Honor. We rest.

THE COURT: Does the State have anything they would like to offer at this time?

MR. FALLIS: No, Your Honor, the State has nothing to offer, other than we would like to be heard on the matter.

THE COURT: The petitioner may be heard at this time.

MR. SMALLWOOD: Your Honor, without going into great lengths to the law involved, it is rather convoluted, a great amount of case law. Brady v. Maryland, basically as I understand the law today, Bardy is still good law, but it is qualified to a certain extent by the case of U. S. v. Agurs.

U. S. v. Agurs, as I understand it, deals with the degree of materiality that a petitioner must show based upon the type of request, or the absense of the request, that is made regarding what has been known as and called Brady exculpatory material. The more specific the request made by the petitioner, the mless degree of materiality he or she must show in order to show a violation of due process that falls in the 14th Amendment to the United States Constitution.

I feel, based upon the written reports in this case and the statements from Mr. Fallis, that while he may not specifically recall me asking for specific information of this nature, he doesn't necessarily, as I remember his testimony, deny that occurred and indicated it had in fact occurred. His statement would have been no, that the State doesn't process any such material.

I feel that a specific request on the type three cases, U. S. v. Agurs, has been met. I feel the type two cases in U. S. v. Agurs has been met, therefore, I feel the only burden the petitioner must show, or this petitioner must show, is the purported evidence could have been responsible, or could have altered the verdict of guilt or innocence, or could have been a mitigating factor on the punishment section on this trial. Taking into consideration that this was a capital murder case, I feel that burden certainly has been met.

If I could, Your Honor, I would like to very briefly go through the exhibits attached to the application and make reference to them. I think we can assume, and I think it has been testified to, that all the material contained in Exhibit B, B-1, C, C-1, D, D-1 were in the hands of the Tulsa County District Attorney, and he had knowledge of those, at least prior to trial of this matter in December, 1977.

Exhibit B and B-1 indicate that a pickup truck, which is described as being similar, if not exactly like, the Ashmore pickup truck, arrived at 91st and Memorial on the morning of March 18, 1977. That is in direct contradiction to the testimony of Agent R. T. Robison, who testified at trial, beginning at page 481 in the trial transcript and continuing thereafter for some 15, 20, 25 pages. Mr. Robison, I think we can assume, had the information contained in Exhibit B and B-1 in his possession. Yet he nonetheless testified in his opinion that on Thursday, March 17, 1977 - It might be stretching the point to consider it perjury testimony - the Ashmore pickup was there, yet he had evidence indicating just the contrary.

If in fact the Ashmore truck had not been there Thursday, March 17, 1977, the State's circumstantial theory of the case, in my opinion, would have certainly had to change. It was material. They needed to have that truck there. They needed to have Larry Chaney placing that extortion call approximately two hours after he made that long distance telephone call to Sequoyah, made the call at 4:39 on Thursday, March 17, 1977.

The statement of the individual contained in the Petitioner's/Defendant's Exhibit B-1 said it could or could not be Larry Chaney. It is very vague and very general, but does not necessarily fit his description.

In Exhibits C and C-1, once again the statements contained in those exhibits are directly contrary to the testimony of Agent Robison, who said in his opinion the truck had been there since Thursday. The statements in C and C-1 said there was a pickup truck, but not the blue Ashmore pickup, it was a red one.

Once again it confirms that Agent Robison was either engaging in a fantasy about when the truck appeared there, or was directly testifying when there was in fact no truck there, at least the Ashmore truck was not there because an eyewitness placed another truck there on that afternoon and it was a different truck than the Ashmore truck.

I think the most substantial piece of evidence is obviously contained in D and D-1, which placed Kendall Ashmore in Jenks, Oklahoma at 4:10 in the afternoon of March 17, 1977, 110 miles away, and only an half hour's time away from Larry Chaney unquestionably making a long distance telephone call from Sequoyah, Oklahoma. He certainly cannot be in two places at one time. I think the statement would even indicate that Ms. Weaver said she saw Kendall Ashmore in the truck. I don't care who it was. Based on the State's own theory of the case, it could not have been Larry Chaney.

In my opinion, it is extremely exculpatory as to the guilt or the mitigation on punishment. It could indicate another individual would have had to be involved. More than likely, according to this statement (indicating), another individual actually killed Kendall Ashmore and Kathy Brown. The witness' memory as of May 1st, or the month of April, 1981 is not material to this hearing. The only thing that is material to this hearing is whether or not the State had material exculpatory evidence in their possession which was denied us after making a specific request for the same.

I think taking all this material into consideration there is no way that - Your Honor is extremely zealous in protecting individual rights, particularly an individual that received the death penalty -- I can't conceive your telling me that, Your Honor, in sitting in on the hearing of this matter on a nonjury basis, after hearing that information that has been presented to you today, if you were the trier of the facts, that it would not bear heavily on your mind before coming to the decision of guilt or innocence, and certainly before sentencing the individual accused and certainly not sentence that individual to death.

I ask that the conviction and judgment be set aside and a new trial ordered, and/or if the Court feels that the evidence is not of sufficient materiality to do that, at least modify the sentence imposed. Thank you.

THE COURT: Mr. Fallis.

MR. FALLIS: Your Honor, I reviewed the application made by Counsel and it is accually addressing maybe two points of law, so I think for that reason we should address ourselves to those two points; one being, first of all, the nature of how the Court is to test what has been alluded to by Counsel as information, or newly discovered information, in the sense of being exculpatory, or perhaps not exculpatory, and certainly the guiding and controlling case on this point is the Agurs case that has been cited by Counsel in his own brief in support of his application.

The other point is Title 22, Section 1080, Subsection D, which is part of the application insofar as the new trial request based upon newly discovered evidence, so I think his application is in two parts in this sense. In all caution I think we should address ourselves to both.

First of all, I want to take the second point, that is the so-called newly discovered evidence. In that section of law it says if there exists evidence of material facts not previously presented and heard, then that may be the basis for a Court to grant relief under post-conviction procedures.

In this case, it would be the State's position that there has been nothing in this hearing, nothing introduced now that's not inthe Court's knowledge, having presided over the trial of the case, that involves material facts not previously presented, and this, of course, rests upon the determination of material facts and not investigative leads that were checked out, as obviously was the case here.

The law in Oklahoma, insofar as new trials are concerned, the mere fact something might have been determined is not in and of itself the basis for a new trial. As a matter of fact, under the evidence as submitted by Counsel today, there has been nothing presented here that is new. It is of interest, and should be of interest, to the Court that Counsel does not contest Poppy Weaver's statement, apparently, to my office subsequent to his application being filed. She could not then nor can she now identify anybody such as Kendall Ashmore. So under relief of 1080, Title 22, I think the application is not supported under the evidence in this regard.

Now, concerning the other point, the language of the United States v. Agurs, as cited by Counsel, I think, sets out the rules for our purpose here. I would say now as I said on the witness stand, we have an obligation, even without a request, even without a specific request, to make known to the defense exculpatory material. So I'm not bothered by the three levels of what Counsel perceives to be requests based on the Agurs case. Let's assume, for our purposes here -- I adopt the theory of ethics in law: If there is something exculpatory, with or without a request, I have an obligation to turn it over, and that was the testimony I gave today, and that is the testimony I would adopt for argument purposes also.

In that regard, it requires me to look for something in the way of exculpatory material, it requires that in fact that if there is something exculpatory to the accused's guilt and perhaps even insofar as having some bearing upon punishment that could be meted out following a conviction, I must give that to the defense.

I call Your Honor's attention to the language in two parts of that decision that I think are very, very important. On page 2400 under the numbering of No. 5, the language in the last paragraph says that the mere possibility that an item of undisclosed information might have helped the defense or might have helped the outcome of the trial does not establish materiality in the constitutional sense.

I would submit to Your Honor that the Court in Agurs is saying, even if there existed an item of undisclosed information, standing alone it would not be sufficient for the Court to find there had been some constitutional denial of due process of a fair trial.

I would say, based on the evidence here, there is no showing of any possibility that the outcome of this trial would have been affected, and, therefore, it doesn't even rise to that level.

I would call Your Honor's attention also to the language in the same decision on Page 2402 under No. 11, the last paragraph. "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." That raises the question, have you heard anything that raises in Your Honor's mind a reasonable doubt as to the guilt of Larry Chaney in the kidnapping and death of Kendall Inez Ashmore. I think the answer is obviously nothing.

Even if we assumed that Poppy Weaver in this report was actually sure, as Counsel has represented to the Court, and I submit he is not making a fair representation to the Court, he talked to her and didn't take issue when she said she could not identify anybody then or now. Yet he says she can because that is material to him. Even if we assumed that, that would not make any difference insofar as the Court is concerned. Even if she said she saw, and this is an assumption, Kendall Inez Ashmore in that truck, that would make no difference in view of the evidence here. But she didn't, based on the evidence presented.

The little boy in the school bus, I have no doubt the boy saw a truck parked there, and red and white truck. If you will recall the evidence in this case, there is no evidence about a red and white truck. It has no materiality to the issues. Does that raise any reasonable doubt in view of the totality of the evidence, and under the Agurs case that is how the Court must measure this.

Now, Mr. Hamilton, Counsel misstates Mr. Hamilton's own statement that he now claims is exculpatory. He has Mr. Hamilton seeing a truck arrive there sometime before the rain storm on the evening of the 17th. In his own exhibit, which is listed and introduced as Defendant's/Petitioner's Exhibit B and B-1, it reads in part as follows: "He advised at approximately 7:30 A.M. this date" - It says "Interviewed on 3/18/77," that is the date, Your Honor, that the truck was discovered - "he went outside his residence," and it goes on down and says that he observed or he noticed a man leaving the pickup truck, enter a car, which was parked on the other side of the produce building, stated this occured between 8:00 and 8:30 A.M. and was positive on the time.

Counsel says and infers that Agent Robison of the FBI either was having delusions, or perhaps perjuried himself. Your Honor, the way I recall the evidence, the photographic evidence, there was water drip marks outlining parts of that truck. I submit it might take a little bit of logic to assume if you park your car and it rains where the car is parked, unless somebody washed it away, there would be drippings and th outline as opposed to if you had parked your car there sometime after the rain.

I resent the comment by Counsel that Agent Robison lied and I resent more the false representations to this Court. There is nothing inconsistent. As a matter of fact, in the exhibit again, the old gentleman says he remembered the rain the night before he observed the incident. The testimony today -- That has been checked out, was checked out. It does not relate to our case here.

Finally, Your Honor, it is important to note that Oklahoma has spoken in reference to the Agurs case, and the Agurs case sets out, it is your duty as the trial Judge that if you remain convinced of the Defendant's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and the trial judge's firsthand appraisal of the entire record was thorough and entirely reasonable, it should be denied.

Oklahoma follows the Agurs case, which was decided, by the way, in June, 1976; Warner Houston Irvin, Sr. v. State of Oklahoma, August 29, 1980, less than a year ago, 617 P.2nd 588, adhering to the rule of Agurs. Other jurisdictions are: Commonwealth v. Ziegler, decided January, 1980 at 399 N.E.2nd 47, out of the State of Massachusetts; Rodriguez v. State, out of the State of Texas, decided April 16, 1980, cited at 597 S.W.2nd 917, which reaffirms the rule; the State of Idaho in State v. Horn, 610 P.2nd 551. I would state to Your Honor there is a South

Carolina case of State v. Newton; in Utah, Utah v. Gerald. They all follow the Agurs language insofar as the Court considering the context of the entire record, and I ask the Court to indulge me a question of the Court.

Has Your Honor, since the time of being placed on notice of filing of the application for relief under post-conviction appeal on alleged exculpatory material, had an occasion to reread the transcript of the testimony and reacquaint yourself with the totality of the record involving the trial of Larry Leon Chaney in the kidnapping/death of Kendall Inez Ashmore?

THE COURT: Yes, I have, Counsel, in detail.

MR. FALLIS: All right. I would submit and quite frankly say that the Court obviously is well aware and is able to follow the rule of Agurs. Based on that, coupled with the evidence, I submit there has been no reasonable doubt raised. Quite frankly, based on the totality of the record, there is no doubt as to the guilt of Larry Chaney.

MR. SMALLWOOD: I would like to respond first to the attack on me. If I made misstatements regarding the exhibits, they'll certainly speak for themselves. As far as Exhibits B and B-1, that contains the testimony of Agent Robison. B indicates that Mr. Hamilton stated the truck had just driven up at 7:30 A.M. on Friday morning. I can assume the FBI agent had this information in his possession, and yet he stated, based on his observation it had been there since Thursday. That is not contradictory. I was not aware I said anything other than that.

Regarding the statement of Poppy Weaver that Mr. Fallis by innuendo has indicated that I have committed perjury insofar as offering exhibits to you, she indicated in D-1, in a portion of the exhibit, she is certain of the date and time. She was certain of the time because of the fire trucks. She is certain, in this report, as to who she saw, and the firemen ran their records at the Jenks Fire Department and substantiated that she was accurate in the certainty she had.

If her statements are different now, there again we're not here to determine that the human memory fails with the passage of time. We're here to determine if exculpatory evidence was denied me four years ago. I have not intentionally misrepresented anything to this Court, and I do resent the implication I have.

I think the evidence is sufficient to remand this case for a new trial, and/or to modify the punishment in this case, and I ask the Court to do that.

THE COURT: For purposes of the record, I have gone over the entire transcript of the trial. Of course, I've heard the evidence presented here today. I've read very closely all the pertinent points of law that Counsel has raised. I'm going to deny the application for post-conviction relief at this time.

I'll state into the record that I remain firmly convinced, even after hearing all of this evidence here today, that the Defendant in this case was properly convicted by evidence beyond a reasonable doubt. There is no question in my mind at this time, or has there been at any time since the jury brought in the verdict in the trial of this case, that the Defendant was properly convicted.

I sat through the entire trial, naturally, but not only that, over the last few days I've read the transcript again, and as you can see this is a very voluminous transcript, and it has taken me quite a bit of time to do so. I felt it was necessary because of the issues raised in post-conviction relief.

Again, I would like to state, after reviewing all of this, I think this is one of the strongest cases that I've ever seen as a trial judge as far as evidence against the Defendant is concerned. It goes almost beyond any reasonable doubt. It goes beyond any doubt, especially when you consider the case and the totality of the facts during the time of trial, when you consider the fact that the note left in Mr. Chaney's residence, the telephone calls that came out of his trailer, the fact that his palm print was left on the telephone in south Tulsa, that were his prints and were traced to that phone, and, further, the fact that Mr. Chaney did not testify at the trial, all these facts, all these factors, are to be considered by me in this hearing at this time. If I felt otherwise, I would certainly rule accordingly.

Also, I would like to refer to Agurs v. United States and point out what Counsel for the State did not point out, and it's cited on page 2400. This case should be cited 427 US 108, Agurs v. United States. It states, "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." They go on further and say the constitution certainly does not demand that much.

So based upon the totality of the facts, the case that was tried, the evidence that was presented today, the fact that I am still firmly convinced that this Defendant committed this crime, based upon the evidence and everything that was presented at the trial, plus any and all evidence here today, I'm going to, again, as I stated, deny the application for post-conviction relief.

MR. SMALLWOOD: For purposes of the record, if I could clarify, it became clear that evidence was suppressed by the State of Oklahoma. I think everything indicated that. The question of whether it was material and exculpatory, am I to take, for purposes of the record, Your Honor, that you are finding as a matter of fact, the evidence that was suppressed, that it was not material, that it wasn't exculpatory, that it was not one or the other?

THE COURT: There was nothing material or exculpatory that I can find, based upon the totality of the facts in this case, and the testimony that Mr. Fallis gave.

MR. SMALLWOOD: But there was evidence suppressed.

MR. FALLIS: We take issue with that. There was no suppression of evidence, and presupposes exculpatory --

MR. SMALLWOOD: I'll withdraw that.

THE COURT: I think I have completed my remarks, and my remarks will speak for themselves.

MR. SMALLWOOD: If the Court please, I have to appeal this matter. I think it would be very easy if I ask you to clarify that a little bit.

THE COURT: I think I have, Counsel. I have stated it as clearly as I possibly can.

MR. SMALLWOOD: Is it my understanding that the evidence that was in the possession of the District Attorney and not given to me --

THE COURT: The record will speak for itself. We will recess at this time.

** ** **

COURT REPORTER'S CERTIFICATE

STATE OF OKLAHOMA,)
)   ss.
COUNTY OF TULSA,)

I, Virginia A. Boone, Official Court Reporter for the Disctrict Court of Tulsa County, State of Oklahoma, do hereby certify the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause before the Honorable Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma on May 1, 1981.

I further certify I am not related to nor counsel for any of the parties.

Affix my hand and seal on this 29th day of June, 1981.

Virginia A. Boone

Virginia A. Boone, CSR-RPR-CP

JUDGE'S CERTIFICATE

STATE OF OKLAHOMA,)
) ss.
COUNTY OF TULSA,)

I, Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma, do hereby certify the foregoing transcript in the aforementioned cause was presented to me, and I now sign the same as true and correct, and request that it be attested and filed by the Court Clerk.

Witness my hand this 1st day of July, 1981.

JUDGE OF THE DISTRICT COURT

ATTEST:

Court Clerk.

Copy

RECEIVED
JUL 30 1981
ATTORNEY GENERAL
of Oklahoma

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

LARRY LEON CHANEY,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PC-81-345

CRF-77-756

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 30 1981
Ross N. Lillard, Jr.
CLERK

Transcript of the proceedings had in the above-entitled cause on July 8, 1981 before the Honorable Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma.

APPEARANCES:

ALLEN M. SMALLWOOD, ESQUIRE,
Counsel for Petitioner.

JERRY E. TRUSTER, ESQUIRE,
Chief Prosecutor, District Attorney's Office,
Counsel for Respondent.

DISTRICT COURT
FILED
JUL 29 1981
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

REPORTED BY:

Virginia A. Boone, CSR, RPR-CP,
Official Court Reporter.

** ** ** **

APPENDIX "B"

PROCEEDINGS

THE COURT: This is case number CRF-77-756, Larry Leon Chaney versus the State of Oklahoma. This hearing is brought by application filed on behalf of the petitioner to reopen the post-conviction relief for further evidence.

After I received this application I contacted both the petitioner and respondent attorneys and advised them that the hearing would be set this morning on this application, and we briefly discussed it off the record, but I feel it should be put on the record at this time.

First of all, do you want to go ahead as the petitioner's attorney and state your grounds?

MR. SMALLWOOD: I do, Your Honor. Thank you.

It's my recollection, Judge, the hearing on my initial application for post-conviction relief was held on Friday, May 1, 1981. At that time, and the case made speaks for itself, I had received evidence, which had been attached to my application, marked as exhibits A through D-1 indicating that the State had in their possession prior to the preliminary hearing in this case, which was sometime in March of 1977, statements of witnesses indicating that, in my opinion, the defendant in this case, Larry Leon Chaney, was in no way associated with or guilty of either of the crimes of which he was charged, or at the very least such testimony or evidence would be mitigation as to punishment even if he were convicted of first degree murder.

Immediately prior to the hearing — I did not know the names of the witnesses. They had been blocked out, and I did not know the name of the FBI agent that had taken the statements. Those names were also blocked out.

Immediately prior to the hearing I found out the names of the witnesses who had made the statements. I contacted some of them and spoke with them. At the time of the hearing I had not learned the names of the FBI agents. I did learn from conversation with Mr. Fallis and certain witnesses that as of May or April, 1981, they were not saying the statements contained in the written transmission, or the Exhibits attached to my application were not accurate statements of what they had made to the FBI agents in March, 1977.

Mr. Fallis made that assertion both in answer to my questions and in his argument to the Court. I cannot deny that was the case because I had talked to the witnesses, and they were in fact now claiming that those written statements were not accurate.

Approximately, one to two weeks after the hearing occurred Mr. Fallis gave me the names of two FBI agents responsible for taking statements as shown in Exhibits A through D-1. One of the agents, Tom McLain, an agent here in Tulsa, I contacted him. My telephone call jogged his memory.

He indicated that he had taken the statement of Poppy Weaver, Exhibits C and C-1, he acknowledged that. In my conversation with him I told him Poppy Weaver was now saying what was in the written report was not what she told him. Agent McLain indicated emphatically, although he could not vouch for the truthfulness of the oral statements given to him by any of the witnesses, he was absolutely and certainly positive that the written reduction of the oral statements made to him by Poppy Weaver was a true and accurate transmission of what had been said to him.

I feel since I did not have that information from Agent McLain at the time of the hearing, and under the new rules of evidence, I have a right to impeach my own witness. Had I had this evidence, I would have put Agent McLain on to bolster or substantiate the written statements of those witnesses, and that the statements made to Agent McLain were true and accurate.

I'm asking the Court now to allow me to reopen the post-conviction relief for the sole purpose to subpoena Agent McLain to make the statement in person to Your Honor in order to bolster and substantiate the fact the information contained in those statements were accurate. Nobody can vouch for the truthfulness, but it was an accurate reduction of the statements made to Agent McLain, and it is certainly exculpatory.

Therefore, it would obligate the Court to grant the petitioner a new trial or modify the sentence.

MR. TRUSTER: Just a brief response. My first observation, I was not present during the lengthy post-conviction relief held in your Court as cited by Counsel. I have not been a party to this particular lawsuit at any stage either as an advocate or in any position during the hearing or trial, or in any other capacity until today.

However, it would be my observation that apparently from what Counsel has said, the person, Poppy Weaver would have been available to testify at the former hearing. If I'm in error, I apologize. If I'm not, I would make a further comment - that would be, of course, the best evidence of what Counsel has stated, and what Counsel has stated to reopen the post-conviction relief. He could have called Poppy Weaver at that time. If in fact that testimony had been given that might have disposed of the entire matter.

Nothing Counsel has said has given rise or any indication to me sitting here of any exculpation that would be any part of our file. The Court has made rulings that there was nothing exculpatory withheld from Counsel at the trial on an earlier occasion. We ask you to deny the application to reopen at this time, and say that nothing Tom McLain would say, if Counsel's representations are accurate, that would in any way change the former findings by this Court. There is nothing exculpatory the defense has been denied.

For those reasons and for the additional more important one, quite frankly, that is the very purpose of post-conviction relief. It is best summarized in the Law Review article by

Professor Lerbance from Oklahoma City University, who has credentials fairly impressive, cited at Volume 3, a law journal of the Oklahoma City University School of Law, February, 1976. In that article he expresses the view that there are several situations that have now been combined, and relief has been given by virtue of the passage of the post-conviction relief act, and the principal reason for the importance of that is to let a court of law have a single hearing and just indicate once and for all those matters alleged to have been error, constitutional and otherwise. That purpose would be defeated by Counsel's application to reopen a hearing that has been held by Your Honor and concluded with findings of fact and conclusions of law.

Additionally, I would only say, if the Court takes the position to reopen the hearing, what would become of a situation that was thought of by this act? It would in fact result in an unending number of applications upon applications for piecemeal relitigation of post-conviction procedure.

For all those reasons I ask the Court to deny the application to reopen the post-conviction relief.

THE COURT: I'll deny the application of defense counsel -- counsel for petitioner at this time.

MR. SMALLWOOD: If I could briefly respond, Your Honor.

THE COURT: Very well.

MR. SMALLWOOD: It would not be unending as long as the evidence you are alleging to have discovered was not available at the trial, or for the post-conviction relief. The evidence of Tom McLain was not available.

Number 2, I have yet to receive a written finding of facts. I have to attach that to my petition in error. I have yet to receive written conclusions of law. I ask Your Honor to direct the District Attorney to provide me with written findings of fact and conclusions of law to accurately reflect --

THE COURT: I don't think that is necessary since everything was reported.

MR. SMALLWOOD: It is in the statutes. It must be attached to the petition in error.

THE COURT: Show me the statute.

MR. SMALLWOOD: Title 22, and I quote, "if application cannot be disposed of on pleadings and record, or there exists material issue of fact, trial court must conduct evidentiary hearing, and make specific findings of fact stating expressly its conclusions of law relating to each issue presented."

THE COURT: Which section?

MR. SMALLWOOD: 1084. The rules of the Court of Criminal appeals is that written findings of fact and conclusions of law must be attached to the petition in error.

MR. TRUSTER: If the Court please, there is nothing in 1084 that says the Court is obligated to reduce the oral findings of fact and conclusions of law into writing. There is nothing in 1084 that says that.

I think the Court's observation earlier is correct, that is why you have a Court Reporter and that is why a transcript is prepared. Counsel stated before this hearing he had ordered the same, and is going to attach it to the appeal record. I think for all those reasons the matter is clear.

THE COURT: I do recall stating my decision in the record. Did I not, Counsel?

MR. SMALLWOOD: You just denied it, Judge.

I would call Your Honor's attention to the rules of criminal appeals regarding appeals of this nature, post-conviction relief appeals to the Court of Criminal Appeals. I need to attach the findings of fact and conclusions of law to my petition in error, and it so states that in the rules.

THE COURT: Do you have anything else to offer?

MR. SMALLWOOD: I would state I have had conversation with Agent McLain, and he is available pursuant to subpoena power to testify. Putting his testimony in the record would cause no harm or delay to the State or Your Honor.

THE COURT: I will deny the application and will allow an exception.

(The proceedings were concluded at this time.)

STATE OF OKLAHOMA)
)   ss.
COUNTY OF TULSA   )

I, Virginia A. Boone, a Certified Shorthand Reporter within and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct transcription of the proceedings had on July 8, 1981 before the Honorable Jay D. DAlton, Judge of the District Court in and for Tulsa County, State of Oklahoma.

I further certify I am not related to nor counsel for any of the parties.

Affix my hand and seal this 24th day of July, 1981.

Virginia A. Boone

Virginia A. Boone, CSR, RPR-CP,
Official Court Reporter.

** ** ** **

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

I, Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma, hereby certify that the foregoing was presented to me in the aforementioned matter, and I now sign the same as true and correct, and request that it be attested and filed by the Court Clerk.

Witness my hand this 28th day of July, 1981 at Tulsa County, State of Oklahoma.

JUDGE OF THE DISTRICT COURT

ATTEST:

Court Clerk